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No. 92-1253

Supreme Court, U.S.
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In The

Supreme Court of the United States

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October Term, 1992

ANGEL TORRES, JOSEFINA TORRES, RENE JEANTINE, ROCHETTE JEANTINE, EMILE ROUSSEAU and CLAIRE ROUSSEAU,

-against- *Petitioners,*

THE CITY OF NEW YORK and BROOKLYN NAVY YARD DEVELOPMENT CORPORATION,

Respondents.

BROOKLYN NAVY YARD DEVELOPMENT CORPORATION,

-against- *Respondent,*

COASTAL DRY DOCK & REPAIR CORP.,

Respondent.

THE CITY OF NEW YORK,

-against- *Respondent,*

COASTAL DRY DOCK & REPAIR CORP.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

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QUESTIONS PRESENTED FOR REVIEW

The broad issue presented for review is whether federal admiralty jurisdiction extends to the personal injury action is issue, an action which arises from an accident in which three dry dock workers sustained off-vessel injury when the land-based scaffolding on which they were standing collapsed. This, is turn, depends on resolution of the following questions, as to which review is sought:

1. Does a vessel immobilized in dry dock constitute a "maritime situs" for purposes of admiralty jurisdiction over tort claims?

2. Assuming that a dry-docked vessel is itself a "maritime situs", does the proverbial gangplank serve as the dividing line between the maritime and state regimes, as with vessels in harbor, or does admiralty jurisdiction instead extend to adjacent land-based structures such as the scaffolding involved in this case?

3. Where land-based dry dock workers sustain off-vessel injury in consequence of their employer's use of unsafe equipment and work procedures, does the workers' third-party suit against the land-based owners of the dry dock present sufficient "nexus" to traditional maritime concerns as to warrant federal admiralty jurisdiction?

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Opinions Below

The initial decision and order of New York Supreme Court, Kings County, dated December 13, 1989, is not reported, but is reproduced in the appendix at pages 1a-3a.

The opinion and order of the New York Supreme

Court, Appellate Division, dated February 24, 1992, affirming the dismissal of the petitioners' complaint, is reported at 177 A.D.2d 97 and 581 N.Y.S.2d 194. The Appellate Division opinion and order is also reproduced in the Appendix at pages 4a-30a.

The New York Supreme Court, Appellate Division order denying leave to appeal to New York's Court of Appeals, dated April 22, 1992, is reproduced at pages 31a-32a of the Appendix. The order of New York Court of Appeals, dated September 22, 1992, also denying leave to appeal to the Court of Appeals, is not yet reported, but is reproduced at page 33a of the Appendix.

JURISDICTION

The decree as to which review is sought is the order of the New York Supreme Court, Appellate Division, dated and entered February 4, 1992. Said order affirmed a lower court order which had granted summary judgment to the defendants on the ground that the petitioners' claim against defendants was not actionable under substantive maritime law.

In the aftermath of said determination, the petitioners, who were not entitled under New York law to appeal as of right from New York's Appellate Division to New York's Court of Appeals (CPLR § 5601), successively sought discretionary leave to appeal to New York's Court of Appeals, first from the Appellate Division and then from the Court of Appeals. Both applications were denied.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) on the following grounds: 1) the issues raised, all relating to the scope and breadth of admiralty jurisdiction, involve important questions of federal law as to which there is substantial conflict, and, 2) that New York's Appellate Division, an intermediate appellate court, was the highest court within the New York state court system in which

decision could be had.[1]

STATUES INVOLVED

The statutes involved are reproduced at pages 34a to 39a of the Appendix hereto.

STATEMENT OF THE CASE

It has long been settled that, as to vessels lying in harbor, the gangplank serves as the rough boundary between the state and maritime regimes, with the consequence that the tort rights of harbor workers injured aboard vessel are defined by maritime law while those of workers injured off-vessel are governed by state law. What, however, if the vessel is removed from the water entirely and placed up on keel blocks in a dry dock? Logically, there would seem to be no reason why the vessel's removal from navigable water should dictate expansion of admiralty jurisdiction beyond the proverbial gangplank, but such is precisely what New York's Appellate Division ruled in this case. Recognizing that admiralty jurisdiction does not extend to off-vessel accidents in harbor, the court held that admiralty jurisdiction nevertheless applies to off-vessel accidents in dry dock. Such ruling, a ruling which has placed New York's state courts in conflict with New York's federal courts, is amongst those which petitioners ask this Court to review.

A. The Subject Accident

This is a personal injury action. Petitioners Angel Torres, Rene Jeantine and Emile Rousseau were all land-

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[1] Because New York's Court of Appeals declined to review the Appellate Division determination, petitioners seek that writ be taken to the New York Supreme Court, Appellate Division rather than to New York's Court of Appeals. *Tumey v. State of Ohio,* 237 U.S. 510 (1926); *Williams v. Florida,* 399 U.S. 78 (1970).

based dry dock workers in the employ of respondent Coastal Dry Dock & Repairs [hereinafter Coastal] (72-73, 304, 368, 387).[2] They were injured when the scaffolding which they were standing upon collapsed (355-359). The threshold issue was whether the workers' tort action against the owners of the site was governed by New York law or by federal maritime law, an issue which turned on whether the case did or did not fall within admiralty jurisdiction.[3]

The incident in issue occurred during renovation/repair of the USS Stump (331, 377-378), a U.S. Navy vessel which was then immobilized on keel blocks (375). The situs of the accident, a graven dry dock located in Brooklyn, New York, was owned by respondent City of New York (320, 457, 648-881). Respondent City of New York had leased the premises to respondent Brooklyn Navy Yard Development Corporation [hereinafter Brooklyn Navy Yard]. Brooklyn Navy Yard had then subleased a portion thereof to respondent Coastal, this with the intent that the latter would operate a dry dock facility on the leased premises (308, 456-457, 475-647). All of the petitioners were New York residents (16) and all of the respondents were domestic or municipal corporations which were principally located in the State of New York at all pertinent times (16, 25, 42, 652).

At trial, there was no real dispute as to how the accident occurred, or why. Coastal was attempting repair of a propeller. In order to repair the propeller, the workers first had to remove a propeller bearing (309, 330-331, 377-

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[2] Numbers in parentheses refer to pages in the Record on Appeal filed in the New York Supreme Court, Appellate Division, except that numbers followed by "a" refer to pages in the Appendix appended to this Petition.

[3] If the case is within the scope of admiralty jurisdiction, it is governed by substantive maritime law. If it is not within the scope of admiralty jurisdiction, it is not governed by substantive maritime law. *See East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864 (1986); *Harville v. Johns-Manville Products Corp.*, 731 F.2d 775, 779 (11th Cir. 1984); *Butler v. American Trawler Company, Inc.*, 887 F.2d 20, 21 (1st Cir. 1989) ("maritime law governs if there is admiralty jurisdiction").

378). Basically, the bearing had to be "rigged" to a crane, and then hoisted (327, 366). Coastal foreman Oscar Lucien, who was the petitioners' immediate supervisor (327, 366, 388), chose to rig the chains by means of an "eye bolt" (327, 345-348, 378). The crane utilized for the lift was a shore-based crane, operated by another Coastal employee, and bearing Coastal's name (401-402).

During the course of the attempted lift, the three petitioner-workers stood on top of a free-standing "pipe scaffold" which had been erected next to the vessel (356). This was described as a metal scaffold constructed in stages, each stage "about six feet high", which "you can build as high as you want . . . [l]ike they do on construction" (356). The bottom of the scaffold stood on, and was obviously supported by, the dry dock itself (404). Witnesses variously estimated the height of the scaffold as ranging from twenty-five to thirty-five feet above the floor of the dry dock (354, 400). There was testimony that the side of scaffolding was approximately eight to ten feet from the vessel (392). From this location, the three dry dock workers were supposed to manually insure that there was sufficient slack for the lift (407). None of the men had been provided with a lifeline, safety belt or other device which would prevent him from falling in the event of an accident (357, 390).

At some point during the lift, the "eye bolt" which had been used to rig the bearing broke (329-330, 366). This caused either the eye bolt or the bearing itself to strike the top stage of the scaffold, which then collapsed (355, 358-359). The three workers fell to the floor of the dry dock (355, 358-359).

At trial, Coastal's rigging superintendent, Theodore Hansen, testified that it was improper to use an eye bolt for a horizontal lift of the sort in issue (346, 348, 362-363), basically because such device was not designed or intended to bear the stress of such a lift (346-348). He further stated that he was "very astounded" that an "experienced" rigger like Lucien would make such a mistake (383). Mr. Hansen also stated that the scaffold should have been

equipped with railings or that the workers should have been provided with safety belts and lifelines or safety nets (434-435). Mr. Hansen's opinions were seconded by Howard Edelson, petitioners' safety expert. Mr. Edelson testified that it was a "known fact" in the industry that an eye bolt should never be used for a horizontal lift (430).

All of that which has thus far been related *vis-a-vis* the occurrence of the accident was uncontroverted. There was, for example, no claim that the accident had occurred in some other fashion, no claim or proof that the load had not been improperly rigged, and no claim or proof that such was not the reason why the scaffold had been caused to collapse.

B. The Procedural History Of The Action, And Of The Choice-of-Law Issue

In the aftermath of the 1983 accident, the three injured workers, together with their respective spouses, brought suit in the Supreme Court of the State of New York against site owners City of New York and Brooklyn Navy Yard (15-21).[4] These defendants then impleaded employer Coastal (30-34, 38-46). The case eventually came to trial in September of 1989.

Petitioners' case against respondents City of New York and Brooklyn Navy Yard was premised upon a special statutory cause of action set forth in section 240, subd. 1, of New York's Labor Law (18, 56, 87). This statute was enacted to ensure that workers who are employed to do construction work, a category which has been deemed to include repair of vessels[5], are provided with sufficient

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[4] As has been noted, respondent Brooklyn Navy Yard was actually the sublessor and respondent City of New York was the owner-lessor of the property. Nonetheless, for the sake of convenience, they are herein collectively characterized as the "owners" of the property.

[5] *See, Maleeny v. Standard Shipbuilding Corporation*, 237 N.Y. 250, 260 (1923); *Herman v. P.H. Fitzgibbons Boiler Co.*, 136 App.Div. 286, 120 N.Y.S.2d 1074 (4th Dep't 1910); *Gruner v. Texas Co.*, 133

safeguards to protect them from falling when such workers are required to work at elevated heights.[6] The law is intended to accomplish this by rendering the owners of the site legally responsible for providing "proper protection" to such workers irrespective of whether such owners direct or control the work, this on the theory that construction work performed at elevated heights is particularly hazardous and that imposition of such legal responsibility will induce site owners to require their contractors or lessees to be more careful when performing work within the ambit of the statute.[7] Violation of the statute is deemed to create "absolute" liability, *i.e.*, liability is imposed irrespective of whether the owner was negligent and irrespective of whether the worker was contributorily negligent.[8] Yet, at the risk of stating the obvious, New York's Labor Law did not apply to the action unless the workers' third-party action against the site owners was governed by New York law, not by federal maritime law.

At trial, and in the appeal which ensued, the respondents argued that the tort action was governed by substantive maritime law and that liability could not be imposed under maritime law since there was no claim or proof that the site owners had been actively negligent (11-12, 110-153; Respondents' Appellate Division briefs).[9]

App.Div. 413, 117 N.Y.S. 741 (2nd Dep't 1909); *Chaffee v. Union Dry Dock Co.*, 68 App.Div. 578, 73 N.Y.S. 908 (4th Dep't 1902).

[6] *Rocovich v. Consolidated Edison*, 78 N.Y.2d 589, 577 N.Y.S.2d 219 (1991); *Bland v. Manocherian*, 66 N.Y.2d 452, 497 N.Y.S.2d 880 (1985).

[7] *Zimmer v. Chemung County of Performing Arts, Inc.*, 65 N.Y.2d 513, 493 N.Y.S.2d 102 (1985); *Haimes v. New York Telephone*, 46 N.Y.2d 132, 412 N.Y.S.2d 863 (1978).

[8] *Rocovich v. Consolidated Edison, supra; Zimmer v. Chemung County Performing Arts, Inc., supra; Bland v. Manocherian, supra; Izrailev v. Ficarra Furniture of Long Island*, 70 N.Y.2d 813, 523 N.Y.S.2d 432 (1987); *Glielmi v. Toys R Us*, 62 N.Y.2d 664, 476 N.Y.S.2d 283 (1984).

[9] Respondents also argued that section 240 of the Labor Law was not applicable to the facts of the case even if the action was governed by New York law (460-461; Respondent Coastal's Appellate

Petitioners, for their part, flatly conceded that the respondent owners had not been actively negligent and that the owners would therefore be entitled to dismissal of the complaint if the tort claims were governed by substantive maritime law (Petitioners' Appellate Division brief, p. 2). Petitioners claimed, however, that the accident had not occurred at a maritime situs, that the action also lacked sufficient maritime nexus, and that, for each of these reasons, admiralty jurisdiction did not exist (171-172, 186-200).

In this context, the trial judge, having initially determined at the outset of trial that the action was governed by New York law (11-14), directed a verdict in the petitioners' favor at the conclusion of the trial on the stated ground that the proof plainly established that the respondent owners were liable as a matter of law under the terms of New York's Labor Law (462-463). Roughly two weeks later, the trial judge overruled his own determination and dismissed the petitioners' complaint, this on the ground that his initial choice-of-law determination had been erroneous and that the case was actually governed by maritime law (9). The Appellate Division thereafter agreed that the case fell within admiralty jurisdiction, albeit for different reasons than those advanced by the trial judge, and accordingly affirmed the dismissal of petitioners' complaint. New York's Court of Appeals denied petitioners leave to appeal, and thus declined to review the issues of federal law which petitioners had sought to raise.

C. The Trial Court's Ruling That The Petitioners' Action Fell Within Admiralty Jurisdiction

The three dry dock workers who were injured when the scaffold collapsed were, of course, LHWCA

Division brief, Point II). This claim was flatly rejected by the trial judge (11-14, 460-462). Thereafter, the Appellate Division declined to address the issue, this on the ground that the Court's determination that substantive maritime law governed disposition of the action rendered the claim moot (30a).

[Longshoremen's and Harbor Workers' Compensation Act] workers who had previously sought and received LHWCA benefits from their employer, respondent Coastal (136-138).[10] At trial, respondents' position was that petitioners' admitted receipt of LHWCA benefits of itself established that the workers' third-party action against the site owners sounded in admiralty (118, 150-151). The trial judge agreed with respondents and ruled that the provisions of the LHWCA thus preempted application of state law (9).

D. The Appellate Division's Resolution Of The Jurisdictional Issues

The Appellate Division acknowledged that admiralty jurisdiction was not co-extensive with the reach of the LHWCA (29a-30a) and that the order appealed from could therefore not be affirmed on the basis of the trial court's reasoning (28a-30a). Rather, the pertinent questions were: 1) whether the scaffolding which petitioners were standing upon constituted a maritime situs, and, 2) whether the case as a whole presented sufficient "nexus" within the meaning of the standards set forth by this Court in *Executive Jet Aviation v. City of Cleveland,* 409 U.S. 249 (1972), *Foremost Insurance Co. v. Richardson,* 457 U.S. 668 (1982) and *Sisson v. Ruby,* 497 U.S. 358 (1990).

As to the first issue, the Appellate Division was aware that the District Court for the Eastern District of New York had held that dry docks are deemed extensions of the land (20a), and it acknowledged that this Court had repeatedly held that the gangplank serves as the rough boundary between the maritime and state regimes even as to vessels actually anchored in navigable harbors (14a-16a). However, New York's Court of Appeals had previously held that dry dock accidents, whether on or off vessel, fell within

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[10] So as to avoid any misconception that the petitioners herein sought a "double recovery" of LHWCA benefits, it should be noted that 33 U.S.C. § 933 provides the LWCHA employer with a lien against the third-party recovery in the full amount of the benefits paid. *See Bloomer v. Liberty Mutual Insurance Company,* 445 U.S. 74 (1980).

admiralty jurisdiction, this in the case of *Butler v. Robins Dry Dock & Repair Co.*, 240 N.Y. 23 (1925). The Appellate Division therefore concluded that the absence of any Supreme Court determination directly holding to the contrary compelled it to follow the *Butler* Court's ruling that admiralty jurisdiction did extend to off-vessel accidents in dry dock (16a). In so ruling, the Appellate Division allowed that the merits of *Butler* might be "considered fairly debatable as a matter of general logic" in light of the Supreme Court rulings *vis-a-vis* off-vessel accidents in harbor. However, the point, as the Appellate Division saw it, was that it was "obligated" as "an intermediate appellate court" to follow the Court of Appeals' ruling in *Butler*, "whatever might be our view of the force of its underlying rationale" (16a).

With respect to the "nexus" issue, the Appellate Division reasoned that ship repair was a traditional maritime activity and that an accident arising from this traditional maritime activity therefore presented sufficient relation to maritime concerns as to warrant admiralty jurisdiction (24a-25a). In so ruling, it noted that its decision "could be regarded as in conflict with certain decisions made by other courts" (24a). In its opinion, those decisions had carried the "nexus" test "too far" (24a-25a).

REASONS FOR GRANTING THE WRIT

1. There Is Basic Conflict As To Whether A Vessel In Dry Dock Is Or Is Not A "Maritime Situs" For Purposes Of Admiralty Jurisdiction, With The Consequence That Dry Dock Workers' Substantive Tort Rights Currently Vary With The Choice Of Forum And With The Presence Or Absence Of Diversity Jurisdiction.

Historically, there were two different tests for admiralty jurisdiction. In actions arising from contract, jurisdiction turned upon whether the contract was deemed sufficiently "maritime" in nature, whereas jurisdiction as to tort actions depended exclusively upon the situs of the injured

person(s). *Grant Smith-Parter Ship Company v. Rohde,* 257 U.S. 469, 476 (1922); *Victory Carriers, Inc. v. Law,* 404 U.S. 202 (1971) (citing numerous cases and discussing the historical origins of the rule).

With respect to tort actions, the initial rule focusing exclusively upon the location of the injured persons was modified in two respects, one statutory and one arising from common law. First, admiralty jurisdiction as to tort claims was statutory expanded with the enactment of Admiralty Extension Act (46 U.S.C. § 740, quoted in the appendix), in essence providing that jurisdiction would also extend to injuries on land where the injury was caused by a vessel in navigable waters.[11] Second, admiralty jurisdiction was judicially contracted by this Court's injection of a second jurisdictional prerequisite over and above that of "situs", namely that the action as a whole present a sufficient "nexus" to traditional admiralty concerns. *Executive Jet Aviation v. City of Cleveland, supra.* While the precise contours of this comparatively new "nexus" prerequisite remain very much in issue (see discussion below), the point for present purposes is that, except for injuries proximately caused by a vessel, the existence of a maritime "situs" remains a necessary condition of admiralty jurisdiction as to third-party tort claims. *Sisson v. Ruby, supra,* 497 U.S. 358, 110 S.Ct. 2892, 2895-2896 (1990); *Butler v. American Trawler Company, Inc., supra,* 887 F.2d 20, 21 (1st Cir. 1989); *Keene Corporation v. United States,* 700 F.2d 836, 843 (2nd Cir. 1983), cert. den., 464 U.S. 864 (1983).

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[11] In the Appellate Division, apart from arguing that petitioners were injured while at a "maritime situs", respondents also argued that admiralty jurisdiction existed pursuant to the Admiralty Extension Act, the theory being that this was a case in which a vessel "on navigable water" had caused injury which was "consummated on land." The latter argument was rejected by the Appellate Division on the ground that "there was no defect in the [propeller] bearing itself, and it cannot properly be regarded as the instrument which led to the accident" (11a). *See Margin v. Sea-Land Services, Inc.,* 812 F.2d 973 (5th Cir. 1987); *McCullum v. United International Corporation,* 493 F.2d 501 (9th Cir. 1974); compare *Garrett v. Gutzeit O/Y,* 491 F.2d 228 (4th Cir. 1974).

Here, while the fact that the injuries in issue did not actually occur on the vessel raises a further issue, the initial question is whether a dry-docked vessel is itself a maritime "situs" for purposes of admiralty jurisdiction as to third-party tort claims.[12] This Court has not addressed that issue, but other courts have, with inconsistent results.

The seminal "dry dock" cases involved salvage and contract claims, not actions in tort. In *Cope v. Vallette Dry Dock Co.*, 119 U.S. 625 (1887), this Court held that a dry dock, even a floating dry dock, was not a subject of salvage, the theory being that such a dry dock is "not used for the purpose of navigation . . . any more than is a wharf or a warehouse when projecting into or upon the water" (119 U.S. at 627). Later, in *The Robert W. Parsons*, 191 U.S. 17 (1903), the Court held that enforcement of a lien as to repairs furnished to a dry-docked vessel fell within admiralty. This ruling that a contract for dry dock repairs was "maritime" in nature was then held, in *The Steamship Jefferson*, 215 U.S. 130 (1909), to logically dictate the further conclusion that a dry-docked vessel was a subject of salvage in admiralty, this notwithstanding that the dry dock itself was not. In the process of reaching these conclusions *vis-a-vis* the scope of admiralty jurisdiction as to the contract and salvage claims in issue, the Court, particularly in *The Robert W. Parsons*, made statements to the effect that repair work performed in dry dock did not constitute work performed on land, but the fact is that such statements were not made in context of a tort action nor for the purpose of defining admiralty jurisdiction as to tort claims. Moreover, any suggestion that such decisions depended on the premise that the dry-docked vessel still lay

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[12] This issue as to whether a vessel in dry dock is a maritime situs was briefed and contested by petitioners in the trial court (186-190, 231-233). However, petitioners flatly conceded that the Appellate Division would be constrained to follow binding New York precedents establishing that a vessel in dry dock is a maritime situs, this notwithstanding, as was also noted in the petitioners' Appellate Division brief, that some federal courts had ruled otherwise (Petitioners' Appellate Division brief, pp. 40-47).

in navigable waters was dispelled by the Court's subsequent decision in *North Pac. S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co.*, 249 U.S. 119 (1919), wherein the Court held that admiralty jurisdiction equally extended to a contract dispute arising from repairs which had been performed after the vessel had been hauled up on land, the central point being that jurisdiction depended on the nature of the contract and that there was no difference as to the character of the work "whether they [the repairs] are made while she [the vessel] is afloat, while in dry dock, or while hauled up by ways upon land" (249 U.S. at 128).

Apart from these decisions as to contract and salvage claims, this Court also held that various tort claims, all of which involved accidents which occurred while the worker was afloat, were within admiralty jurisdiction. In *Great Lakes Dredge & Dock Co. v. Kierejuewski*, 261 U.S. 479 (1923), which involved a worker who was standing on scaffold built upon a float in order to repair a vessel which was itself afloat, admiralty jurisdiction was deemed to extend to the accident there in issue, an accident which occurred when the float was swamped and the worker was drowned. In *Gonsalyes v. Morse Dry Dock & Repair Co.*, 266 U.S. 171 (1924), wherein libelant sustained injury while working aboard a ship in a floating dry dock, the Court also held that the claim lay in admiralty, adding that "the repairs were made upon the ship while supported by a structure floating on navigable waters" and "the accident did not occur on land" (266 U.S. at 172). Finally, in *Robins Dry Dock & Repair Co. v. Dahl*, 266 U.S. 449 (1925), where the injury was sustained aboard a vessel then in navigable waters during the course of repair, the claim was again held to lie in admiralty.

In light of the above, it may be treated as settled that actions in contract arising from dry dock repairs lie in admiralty, and also that tort actions arising from accidents which occurred while the dry dock worker was afloat are within admiralty jurisdiction. However, while one can find supportive *dictum* on each side of the issue, all of this still

begs the question as to whether a vessel under repair is a "maritime situs" for the purposes of tort claims when the vessel is immobilized in dry dock.

In New York, the issue was first addressed in *Danielson v. Morse Dry Dock & Repair Co.*, 235 N.Y. 439 (1923), and then in *Butler v. Robins Dry Dock & Repair Co., supra*. *Danielson* involved an accident on vessel in a floating dry dock; Judge Cardozo's ruling, drawing upon the contract and salvage cases, was that "[a] vessel in a dry dock, which is afloat in navigable waters, is itself in those waters as truly as if moored to a wharf or beside a pier" (235 N.Y. at 242). Thereafter, in *Butler,* it was held that a vessel immobilized in a graven dry dock was also a maritime situs for purpose of admiralty jurisdiction as to a tort action. Again, the Court relied primarily upon the decisions holding that contract and salvage claims arising from such repairs lie within admiralty whether performed on water, in dry dock, or on land. In addition to holding that a vessel immobilized in a graven dry dock constitutes a maritime situs, the *Butler* Court further held that jurisdiction extended beyond the vessel itself to structures adjacent thereto, a point we shall hold in abeyance for the moment.

The New York Court of Appeals decision in *Butler,* holding that a vessel in dry dock is a "maritime situs" and that admiralty jurisdiction therefore extends to tort claims arising from accidents in dry dock, is plainly the New York view as to the boundaries of admiralty jurisdiction. It is not, however, the view of those federal courts which have considered the issue.

In *David Wright Charter Service of North Carolina, Inc. v. Wright,* 925 F.2d 783 (4th Cir. 1991), injury occurred when a vessel, which had been "placed on blocks to undergo repairs in a shed located 75 feet from the water", caught fire (925 F.2d at 784). One worker was injured, another was killed, and tort claims were filed both for the personal injuries and the wrongful death. The holding, by a unanimous appellate panel which included Justice Lewis Powell, was that the tort claims arising from the fire and

explosion on the immobilized vessel did not "satisfy the situs test for admiralty jurisdiction" and that the complaints therefore had to be dismissed for lack of subject matter jurisdiction (925 F.2d at 784).

The very same rule was espoused in *Dirma v. United States*, 695 F.Supp. 714 (E.D.N.Y. 1988), *Omaha Indem. Co. v. Whaleneck Harbor Marina, Inc.*, 610 F.Supp. 154 (E.D.N.Y. 1985), *Matter of Harry Dickenson*, 780 F.Supp. 974 (E.D.N.Y. 1992). Each case was a tort action arising from repair of a vessel which had been immobilized in dry dock. The holding, in each instance, was that admiralty jurisdiction was lacking, this on the rationale that a dry dock, when affixed to the land, is basically an extension of the land, similar to a wharf or a dock at harbor. *Also see United States v. Moran Towing & Transportation Co.*, 374 F.2d 656, 662 (4th Cir. 1967).

In an effort to harmonize the New York Court of Appeals' decision in *Butler* with the federal decisions cited above, respondents belatedly argued, in opposition to the petitioners' motion for leave to appeal to the Court of Appeals, that all or almost all of said decisions were consistent with the allegedly "well settled" rule that the "mean high water mark" serves as "the boundary between state and federal maritime jurisdiction" (Coastal's Memorandum of Law In Opposition to Motion for Leave to Appeal, p. 9). The argument was, however, constructed of wholecloth. First, there was no mention in *Butler* as to whether the location of the accident would have been landward or seaward of the natural tide line if the dry dock had not existed at the site; nor did the term "mean high water mark", or any equivalent, appear in the decision either as an explanation of the result or even as an incidental piece of information deemed worthy of mention. Second, while the vessels in *David Wright Charter Service* and *Matter of Dickenson* were immobilized 75 feet and 50 feet from the water's edge, there was no indication whether this had been artificially achieved by drainage of the sites or whether the areas in issue were naturally landward of

the tide line; nor, once again, was the term "mean high water mark" mentioned in explanation of the result or for any other reason. Third, although respondent Coastal claimed (without citation to the Record) that the vessel herein was "well seaward" of the "mean high water mark", the truth is that there was no proof nor even any claim made at trial as to whether the situs of the dry dock would have been, in its natural state, landward or seaward of the tide line.[13] Fourth, even assuming (notwithstanding the absence of proof) that the dry dock in issue was seaward of the "mean high water mark", it is difficult to see how this could be meaningful as to an accident which befell workers who were standing well above the dry dock floor on top of a scaffold, any more than an accident on a pier or dock is deemed within admiralty on the ground that the area beneath the pier is seaward of the tide line. Finally, and perhaps most simply, the fact of the matter is that the accidents in *Dirma* and in this case actually occurred at the very same facility (*i.e.*, the portion of the Brooklyn Navy Yard subleased to respondent Coastal), and, notwithstanding this, admiralty jurisdiction was deemed to be lacking in *Dirma* and was held to be present herein.

Petitioners do not currently address which rule, that followed by the above-noted federal courts or that followed in New York, is "correct." The point, for present purposes, is simply that there are two different rules, with the consequence that resolution of the jurisdictional and choice-of-law issue presently depends on the choice of forum and the presence or absence of diversity. There are, in this vein, three possibilities as to the outcome of the next case involving a similar (or dissimilar for that matter) dry dock accident:

> First, if the action were commenced in a New York court, that court would be constrained, by

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[13] Indeed, the term "mean high water mark" first appeared, within the context of this action, in respondent Coastal's motion papers submitted in opposition to the petitioners' application for Court of Appeals review.

Butler and by the Appellate Division decision herein, to apply substantive maritime law on the ground that the claim lies in admiralty.

Second, if the same claim arising from the same accident were instead asserted in federal court -- for example, in the District Court for the Eastern District of New York (located a couple of blocks from the state courthouse where the trial herein occurred) -- then, assuming that diversity jurisdiction did not exist, the claim would be dismissed on the ground that admiralty jurisdiction was lacking, as in fact occurred in *Dirma* and *Matter of Harry Dickenson.*

Third, if the action were commenced in federal court, and if the plaintiffs were diverse from the defendants (as might occur if the injured worker resided in New Jersey or Connecticut), then the court, lacking admiralty jurisdiction but possessing diversity jurisdiction, would presumably apply New York law.

Of course, the controversy is by no means limited to New York. If the next "dry dock" accident were to occur in Maine and if action were commenced in that state, the court would still be compelled to choose between two diametrically inconsistent views, those expressed in *Butler* and those expressed in *Dirma, et. al.,* as to whether a dry docked vessel is a maritime situs.

Ultimately, there is an argument to be made in favor of either jurisdictional "rule." There are, no doubt, also arguments which can be made as to whether inclusion of personal injury actions arising from dry dock accidents would advance the purposes of admiralty law or whether such would needlessly include actions which primarily interest land-based parties and the states in which they reside. Yet, regardless of which rule is "right", it is certainly wrong for the worker's right to vary with the choice of forum and with the presence or absence of diversity jurisdiction. The controversy, which is obviously extremely

important to dry dock workers in light of the very different substantive tort rights existent under state and federal law, can be resolved only by this Court.

2. Even Assuming That A Dry Docked Vessel Constitutes A Maritime Situs For Jurisdictional Purposes, There Is Conflict As To Whether Admiralty Jurisdiction Extends Beyond The Vessel Itself Or Whether, As With Vessels In Harbor, The Gangplank Serves As The Boundary Between The State And Maritime Regimes.

If a dry-docked vessel is simply not a "maritime situs" for purposes of admiralty jurisdiction over third-party tort actions, such would presumably be dispositive of the choice-of-law issue posed in this case. If, however, this Court were to determine that this vessel in dry dock was in navigable waters "as truly as [a vessel] moored to a wharf or beside a pier" (*Danielson v. Morse Dry Dock & Repair Co., supra,* 235 N.Y. 439, 442 (1923)), there would then arise the further consideration that the subject accident did not occur aboard the dry-docked vessel. It occurred on a land-based scaffold which had been erected in the well of a dry dock. The question, then, is whether admiralty jurisdiction extends beyond the dry-docked vessel. This question has never been addressed by this Court, but has been addressed by New York's Court of Appeals.

The governing New York authority is, once again, *Butler v. Robins Dry Dock & Repair Co., supra. In Butler,* the subject vessel was immobilized on blocks in a "graven dock." Decedent, a dry dock worker, had been standing on the bottom of the dock, fastening plates to the outside of the vessel. After completing that operation, he started up the side of the dock "for the purpose of getting bolts and a drink of water preparatory, it is assumed, to continuing his repair work" (240 N.Y. at 25). While he was still under the bulge of the vessel, a plate from the side of the vessel dropped upon him and caused his death (*Id.*). In this factual context, the question was whether the plaintiff's tort claim against decedent's employer did or did not fall within

admiralty jurisdiction. This question entailed determination of two issues: 1) whether a vessel immobilized in a dry dock constituted a maritime situs, and if it did, 2) whether jurisdiction also extended beyond the vessel itself to the areas adjacent thereto. As to the first issue, the Court, relying upon its own decision in *Danielson, supra*, and upon this Court's decisions in the salvage and contract cases, ruled that a dry-docked vessel constitutes a maritime situs (240 N.Y. at 26-27). Meanwhile, as to the second issue, the Court in effect adopted a "scope of employment" test. As the *Butler* Court saw it, the "controlling circumstance" was whether the injury had been sustained in the course of work which related to the dry-docked vessel. Within these parameters, the worker's "particular foothold" when injured, whether the worker was on or off the vessel, whether the worker was standing on deck or on a dock alongside the vessel, was deemed fortuitous and immaterial to the jurisdictional question. The *Butler* Court thus reasoned:

> We have no doubt that within the decisions which we have cited, if we are otherwise right, an accident happening to a workman standing on a staging on the outside of a vessel or on a dock at its keel and working on the vessel is just as much a maritime tort as though the man was standing on the deck of the vessel. The controlling circumstance is that he is engaged in making repairs on a vessel regarded as being in navigable waters and the particular foothold within the limits presented by this case which he utilizes in order to establish contact with the vessel and do his work cannot be material. *(Great Lakes Dredge & Dock Co. v. Kierejewsky, supra; Anglo-Patagonian, supra.)* (240 N.Y. at 27).

In the wake of the New York Court of Appeal's decision in *Butler,* this Court has never had occasion to say whether the "scope of employment" test is valid *vis-a-vis* accidents in dry dock, nor whether admiralty jurisdiction can or does extend beyond the dry docked vessel, nor even

whether a dry docked vessel is itself a "maritime situs" for jurisdictional purposes. However, it has repeatedly held that the gangplank serves as the boundary between the maritime and state regimes *vis-a-vis* vessels in harbor.

The leading decision *vis-a-vis* off-vessel harbor accidents is *T. Smith v. Taylor,* 276 U.S. 179 (1928). In *T. Smith*, decided three years after *Butler*, the decedent longshoreman was actively engaged in unloading a vessel which then lay in harbor. As of the accident, he was standing on a "stage" that rested upon a wharf "and projected a few feet over the water to or near the side of the vessel" (emphasis supplied) (276 U.S. at 181). The accident occurred as follows. Cargo was being lowered from ship to wharf by means of a ship-board winch (*Id.*). Decedent's job was to catch and steady the sling which, as of the accident, was loaded with 1,000 pounds of cargo (*Id.*) For whatever reason, the sling allegedly struck decedent and thus knocked him into the harbor (*Id.*) Decedent there drowned. In this factual setting, the Court could have ruled that admiralty jurisdiction extended to any injury which was sustained in the course of work which related to a vessel in navigable waters. It could have ruled that the worker's "particular foothold" was not jurisdictionally "material." It instead held: 1) that the controlling factor in a "fall" case is the place from which the worker fell, not the place where he landed 2) that the accident in issue thus occurred on land, this notwithstanding that decedent was actually over water when struck by the sling, since the stage and wharf were extensions of the land, and, 3) that admiralty jurisdiction therefore did not extend to an accident in which decedent had drowned while performing work which related to a vessel in navigable waters (276 U.S. at 181-182).

The same rule, that off-vessel injuries which occur in the scope of work relating to a vessel in harbor are not within admiralty, was definitively restated in *Victory Carriers v. Law, supra.* In *Victory Carriers,* the accident occurred while the longshoreman was in the process of transferring cargo from the dock to a point alongside a vessel when it

was to be then hoisted aboard the vessel by the ship's own gear (404 U.S. at 203). In contrast to the instant case, the vessel was then in water, in fact in navigable waters. However, the longshoreman was on the dock itself when injured, and therein lay his problem. Noting that "accidents on land were not within the maritime jurisdiction as historically construed by this Court" (404 U.S. at 206), that "[p]iers and docks were consistently deemed extensions of land" (404 U.S. at 205-207), and that "[t]he gangplank has served as a rough dividing line between the state and maritime regimes" (404 U.S. at 207), this Court flatly stated that it was not inclined to "depart from prior law and extend the reach of federal law to pier-side accidents caused by a stevedore's pier-based equipment" (404 U.S. at 204).[14] This Court allowed that the rule legally distinguished between longshoremen injured off-vessel and those injured while "performing similar services on the ship", but explained that such was "neither a recent development nor particularly paradoxical", for it stemmed in part "from the geographical and historical accident that personal injuries on land are covered, for the most part, by state substantive law while such injuries on navigable waters are generally governed by federal maritime law" (404 U.S. at 212-213).

We thus arrive at the paradox implicit in the Appellate Division holding that this action arising from an off-vessel accident at a dry dock is governed by substantive maritime law. Initially, the question confronted in *Danielson, et. al.* was whether a vessel in dry dock, which to the casual

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[14] This jurisdictional distinction between on-vessel accidents and off-vessel accidents was, it is worth noting, recently reiterated in Justice Scalia's concurring opinion in *Sisson v. Ruby, supra*, 497 U.S. 358, 110 S.Ct. 2892, 2898 (1990). There, in setting forth the thesis that the addition of a new "nexus" prerequisite for admiralty was both unnecessary and undesirable, Justice Scalia suggested that the locality test would of itself exclude those cases which really did not belong in admiralty. Justice Scalia then explicitly defined the locality test as limiting jurisdiction to "a wrong which occurs (1) in navigable waters, (2) on a vessel, (3) while the vessel is engaged in a traditional maritime activity..." (emphasis added) (110 S.Ct. at 2989).

observer certainly appears to be missing one of the key components of "navigable waters" (*i.e.*, water), was nonetheless "in those waters as truly as if moored to a wharf or beside a pier." *Danielson v. Morse Dry Dock & Repair Co., supra,* 235 N.Y. at 442 (1923); *also see The Steamship Jefferson, supra,* 215 U.S. 130, 142 (1909) (holding that a vessel in dry dock is no less a subject of admiralty than she would be "if fastened to a wharf in a dry harbor . . ."). Yet, if the very same accident involved herein had occurred immediately adjacent to (but not on board) a vessel "moored to a wharf or beside a pier", admiralty jurisdiction would clearly not exist for the obvious reason that jurisdiction does not extend to land-based structures immediately adjacent to the vessel. We are thus confronted with the conclusion, at least in terms of New York's view of admiralty's limits, that the federal regime stops at the proverbial gangplank when the vessel actually lies in harbor under the control of its crew, but that maritime jurisdiction expands and extends beyond the vessel once the vessel is removed from the water and from the control of its crew.[15]

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[15] The Appellate Division was keenly aware of the incongruity, and did its best to resolve it. Writing for the Court, Justice Bracken observed that the typical pier extending into harbor "is a more or less permanent fixture, and is meant to remain above the water level at all times" (15a). By contrast, the area at which petitioners landed, the floor of the dry dock, "is dry only at times, after the water has been pumped out" (Id.).

Of course, the so-called "distinction" does not survive minimal scrutiny. In reality, Justice Bracken was comparing, on the one hand, the place where plaintiffs herein landed with, on the other hand, the place in which decedent in *T. Smith & Son, supra,* fell from. If one were to instead compare like with like and focus on the locations from which the workers fell in the two cases, there is no difference. Both the platform of the wharf in *T. Smith* and the top of the pipe scaffold in this case were supposed to "remain above the water level at all times." And if one looks solely to places where the workers landed, one is comparing an area which was "dry only at times" (this case) with an area which was never dry (*i.e.*, the harbor in *T. Smith*).

As for the fact that the scaffolding herein was not a permanent fixture, such is surely inconsequential. Workers in harbor often stand on temporary structures which extend over water, and such does not bring them within the scope of admiralty. *See, e.g., Parker v. South*

We are left with the further conclusion, again in terms of New York's view of admiralty's limits, that admiralty jurisdiction does not extend to a longshoreman who drowns in harbor upon being knocked from a pier whose supports lie sunken into the ocean floor, but does extend to a dry dock worker who falls from a scaffold to a dry dock floor which was not even damp.

It may be that the Court, were it to review the matter, would agree that off-vessel dry dock accidents should be treated differently than off-vessel harbor accidents. Or the court might instead rule that the same considerations which dictated that the gangplank serve as the boundary as to harbor accidents equally apply to accidents in dry dock.[16] The Court might even rule that all dry dock accidents, even those which occur on the vessel, are beyond the bounds of admiralty.[17] The point is simply that this Court has not addressed the issue in the past, with the consequence that the boundaries of admiralty law are clouded in uncertainty.

Nor is this uncertainty limited to New York. Should the next off-vessel dry dock accident occur in Louisiana, California or Florida, the trial court would be confronted with several federal decisions holding that a dry dock is not a maritime situs, as well as with the New York decisions to the contrary, none of which would be legally binding as precedent. If the trial court decided that a dry docked

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Louisiana Contractors, Inc., 537 F.2d 113 (5th Cir. 1976), cert. den., 430 U.S. 906 (1977); *Brkaric v. Star Iron & Steel Company*, 409 F.Supp. 516, 518 (E.D.N.Y. 1976).

It is worth noting that Justice Bracken was careful to add that he was not saying that he found the above-noted "distinctions" to be sufficient basis for an extension of admiralty jurisdiction beyond the decks of dry-docked vessels. Instead, his opinion was that a distinction could be made and that the Appellate Division was therefore constrained to regard *Butler* as good law "whatever might be our view of the force of its underlying rationale" (16a).

[16] Such was the ruling in *Egan v. Morse Dry Dock & Repair Co.*, 214 App.Div. 226, 228, 212 N.Y.S. 56 (1st Dep't 1925); *also see Johnson v. Oil Transport Company*, 440 F.2d 109 (5th Cir. 1971).

[17] *See David Wright Charter Service v. Wright, supra*; *Dirma v. United States, supra*; *Matter of Harry Dickenson, supra*.

vessel is a maritime situs, it would then be confronted with this Court's ruling as to off-vessel accidents in harbor and the New York rulings *vis-a-vis* off-vessel accidents in dry dock. Within these parameters, any of a number of conclusions would be possible, ranging from those reached in *Dirma, supra* to those rendered herein. Furthermore, neither the parties nor the trial judge could, with any measure of confidence, predict the result which would ultimately be obtained on appeal.

Petitioners respectfully suggest that the jurisdictional issues posed herein should be reviewed by the Court.

3. The Contours And Nature Of The "Nexus" Prerequisite For Admiralty Jurisdiction Remain Exceedingly Unclear.

Because the point is undoubtedly one of which the Court is already aware, and also because space limitations practically preclude any other alternative in any event, plaintiffs shall be brief.

In *Executive Jet Aviation v. City of Cleveland, supra,* and again in *Foremost Insurance Co. v. Richardson, supra,* (1982), this Court departed from prior law, which had formerly been that admiralty jurisdiction as to tort actions depended strictly on locality. The Court declared that there would henceforth be a second prerequisite for admiralty jurisdiction, that "the wrong bear a significant relationship to traditional maritime activity" (*Executive Jet,* 409 U.S. at 268).

In the wake of *Executive Jet,* the Fifth Circuit adopted a four-factor test for deciding whether an activity does or does not bear a significant relationship to maritime activity. *Kelly v. Smith,* 485 F.2d 520, 525 (5th Cir. 1973), cert. den., 416 U.S. 969 (1974). The *Kelly* test was not universally followed by the Circuits. Far from it, the Seventh Circuit expressly rejected the *Kelly* factor analysis as not "helpful" (*Complaint of Sisson,* 867 F.2d 341 (7th Cir. 1989)) and the Second Circuit, without explicitly rejecting the *Kelly* test, has not adopted or used it. Yet, as Justice Marshall observed in the majority opinion in *Sisson*

v. Ruby, supra, the *Kelly* test continues "to dominate the landscape" (110 S.Ct. at 2897 n. 4). This, of course, leads us to *Sisson v. Ruby, supra.*

Sisson arose from a fire which erupted on a vessel which was docked at a marina. The fire spread to other vessels and to the marina. By 7 to 2, the *Sisson* Court held that existence of a maritime nexus is a separate prerequisite (in addition to a maritime situs) for admiralty jurisdiction, rejecting the concurring view (expressed in an opinion by Justice Scalia) that clear demarcation of the situs prerequisite would of itself adequately police access to admiralty courts while simultaneously providing a jurisdictional boundary which was easier to identify and apply. In holding that there must be sufficient maritime nexus for admiralty jurisdiction to exist, the majority, expanding upon what had earlier been said in *Executive Jet,* explained that the key was whether the activity from which "the general conduct from which the incident arose" was such that it "is likely to disrupt commercial maritime activity" (110 S.Ct. 2895-2896). Justice Marshall's majority opinion also offered some further helpful clarifications, such as an express rejection of the view that navigation constituted the only "traditional maritime activity" in the context of noncommercial activity (110 S.Ct. 2897-2898).

Yet, while so holding, the *Sisson* majority expressly declined to adopt or reject the so-called *Kelly* test, and also expressly declined to adopt any of the other tests which had been previously suggested *vis-a-vis* the nexus prerequisite (110 S.Ct. 2898 n.4). In consequence, while the majority decision in *Sisson* reaffirmed that there is a nexus prerequisite, it really did not alleviate any of the confusion which had previously existed *vis-a-vis* the nature and contours of the "nexus" prerequisite. *See, e.g., "Sisson v. Ruby: Muddying the Waters of Admiralty Jurisdiction",* 65 Tul.L.Rev. 697 (Feb. 1991); *"Much Ado About Nothing, Or Step-By-Step Determinations Of Admiralty Tort Jurisdiction: Sisson v. Ruby",* 15 Tul.Mar. L.J. 439, 447 (Spring 1991).

In this context, *Sisson* leaves us with two problems.

The more obvious but possibly less important problem is that there still exist a variety of different tests and approaches, including the *Kelly* test, which are neither mandated by *Sisson* nor inconsistent with *Sisson*. The larger and more important problem is that there is still confusion as to the very purpose and function of the nexus prerequisite, which confusion has in turn generated wildly inconsistent results.

Compare, for example, the decision reached herein with that reached in *Molett v. Penrod Drilling Co.*, 872 F.2d 1221 (5th Cir. 1969). As in the case at bar, plaintiffs in *Molett* were land-based workers who were engaged in work which related to a vessel; their scaffold was struck and fell; the mishap was caused by defective rigging of a crane. The major difference was that the crane in *Molett* was a shipboard derrick (in contrast to the land-based crane herein) and that the scaffold was suspended over the vessel, with the consequence that the workers landed on the vessel. Conceivably, these differences, most notably that *Molett* could be regarded as involving a ship-board accident, could cause one to conclude that jurisdiction existed in *Molett* and not herein. One could certainly not conclude that sufficient maritime nexus existed in this case but not in *Molett*. Yet, the unanimous holding in *Molett* was that sufficient maritime nexus was lacking, and the unanimous holding herein was that admiralty jurisdiction existed. Analysis of these plainly inconsistent results shows that each conclusion was, on its own terms, understandable. The *Molett* Court focused primarily (albeit not exclusively) on the question of whether national uniformity was necessary as to the matters in issue (872 F.2d at 1226). In this case, the Appellate Division focused primarily on the fact that ship repair has been deemed a "traditional maritime activity" *vis-a-vis* jurisdiction in contract actions.[18] In each instance,

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[18] This logic was, at the least, somewhat ironic in the aftermath of Justice Scalia's concurring opinion in *Sisson*, *supra*. There, really for the purpose of showing how many of the maritime distinctions which had evolved from case-by-case determinations were more humorous

the conclusion made sense given the underlying view as to the nature and purpose of the nexus prerequisite, but the results cannot be harmonized.

This, on a larger scale, is what now confronts the state and federal courts which must determine whether admiralty jurisdiction does or does not exist in any given case. Obviously, the problem is not limited to tort claims involving dry dock workers, nor even to tort claims involving harbor workers. However, such context is one that has seen sharp dispute amongst the lower courts, and little guidance from this Court inasmuch as none of the Court's prior discussions *vis-a-vis* the nexus prerequisite arose from or related to tort actions brought by harbor workers.

At this point in time, the Court may be disposed to reconsider its prior decision not to set forth a more detailed guide as to the parameters of the "nexus" prerequisite, or it may still be of the view that the law would be better shaped by case-by-case resolutions of the issue. Yet, even if the Court still favors the latter approach, this is a case with a fact pattern completely dissimilar to those the Court has previously considered *vis-a-vis* the nexus prerequisite. Furthermore, the resolution of this case would at least alleviate much of the uncertainty as

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than sensible, Justice Scalia singled out the long-standing rule *vis-a-vis* contract actions to the effect that ship repair is maritime in nature and ship building is not (110 S.Ct. 2900-2901). The point was that distinctions of this sort "brought ridicule upon the enterprise." Justice Scalia concluded that, while he did not advocate abandonment of the rules in contract actions since that area "has developed some rules, however irrational they may be", he saw "no reason for expanding that approach to the tort field" (110 S.Ct. 2901).

Against this backdrop, the Appellate Division's chief reason for finding sufficient maritime nexus in this case was that, "It has already been held in the context of a contract action, that the repairing of a ship is a 'maritime' activity" (21a-22a). The Court added: "It would seem to us most unusual if the same activity, *i.e.*, the repairing of a ship, were considered sufficiently related to maritime activities so as to give rise to admiralty jurisdiction in an action sounding in contract, but not sufficiently related to maritime activities so as to give rise to such jurisdiction in an action based on tort" (22a).

to the many actions brought on behalf of injured harbor workers. Petitioners respectfully submit that review is appropriate.

4. The Three Unsettled Issues Herein Presented As To The Limits Of Admiralty Jurisdiction Richly Warrant Review.

Quite frankly, petitioners herein sought application of New York State law for the sole reason that they perceived that such was far more favorable to them than substantive maritime law in the context of the facts. Presumably, respondents opposed application of New York law for the same reason. Both sides sought to advance their self-interest. Their positions were not dictated by any desire to clarify (or muddy) the jurisdictional boundaries, nor by any desire to expand (or contract) the jurisdictional boundaries which will confront other litigants.

It remains, however, that the issues presented herein impact not merely upon the choice of substantive law, but also as to the presence or absence of admiralty jurisdiction *vis-a-vis* similar actions commenced in federal court. In this sense, the question is not only whether an action such as this should be governed by state or maritime law, but also whether actions such as this may be litigated in the federal courts in the absence of diversity jurisdiction.

At the risk of stating the obvious, the jurisdictional and choice-of-law issues posed in this case are threshold issues which necessarily affect all other issues in the case. If jurisdiction is erroneously exceeded, the entire proceeding is rendered a wasteful nullity. If jurisdiction is erroneously deemed lacking, the dispute may go unsettled. If the choice-of-law issue is resolved incorrectly, all that follows thereafter is likely to constitute a sheer waste of the litigants' time and the court's limited resources. For all these reasons, which have been better stated by abler

writers[19], the jurisdictional limits should, if possible, be relatively clear.

Here, happenstance has produced a case which presents three different jurisdictional issues which, perhaps as a matter of historical accident, have never been addressed by this Court: whether a dry-docked vessel is a "maritime situs", whether the gangplank also serves as the boundary between the state and federal regimes in the dry dock context, and whether so-called "vessel repair" cases satisfy the "nexus" prerequisite for admiralty jurisdiction. All of these issues are important. Each presents ramifications that extend far beyond the instant case. Furthermore, all three of these issues have been resolved inconsistently by those courts which have addressed them.

Currently, the district courts for the Southern and Eastern Districts of New York are wrestling with the litigation arising from the asbestos exposure of some six hundred Brooklyn Navy Yard workers. They and the Second Circuit Court of Appeals are resolving the issues therein in accordance with substantive New York law. *In Re Brooklyn Navy Asbestos Litigation,* 971 F.2d 831 (2nd Cir. 1992). Similar asbestos actions are pending in other jurisdictions. Presumably, there are also a fair number of "garden variety" accident cases involving dry dock workers, such as that presented herein. It is, obviously, of some interest that the threshold choice-of-law issue be resolved correctly in these cases. This aside, there is no reason why the scope of admiralty jurisdiction should continue to depend on the identity of the forum court.

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[19] See Justice Scalia's concurring opinion in *Sisson v. Ruby, supra,* 497 U.S. 358, 110 S.Ct. 2892, 2902 (1990).

CONCLUSION

For The Above-Stated Reasons, This Petition For Certiorari Should Be Granted.

Dated: New York, New York
November 17, 1992

Respectfully submitted,

SCHNEIDER, KLEINICK & WEITZ, P.C.
Attorneys for Petitioners
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New York, New York 10007

Of Counsel:
Brian J. Shoot
Gary S. Ehrlich

Appendix A - Decision And Order of The New York Supreme Court, Kings County, Dated December 13, 1989 [pages 1a - 3a]

SUPREME COURT STATE OF NEW YORK

COUNTY OF KINGS IAS PART 4

Index No. 4669/84

ANGEL TORRES, JOSEFINA TORRES, RENE JEANTINE, ROCHETTE JEANTINE, EMILE ROUSSEAU and CLAIRE ROUSSEAU,

Plaintiffs,

- against -

THE CITY OF NEW YORK and BROOKLYN NAVY YARD DEVELOPMENT CORPORATION,

Defendants.

BROOKLYN NAVY YARD DEVELOPMENT CORPORATION,

Third-Party Plaintiff,

ORDER

PRESENT:

- against -

Hon. Frank Vaccaro

COASTAL DRY DOCK & REPAIR CORP.,

December 13, 1989

Third-Party Defendant.

THE CITY OF NEW YORK,

Fourth-Party Plaintiff,

- against -

COASTAL DRY DOCK & REPAIR CORP.,

Fourth-Party Defendant.

Papers used upon this motion:

APPENDIX A
[Decision And Order of The New York Supreme Court]

1) Notice of motion dated 10/6/89 with annexed affirmation of Roger E. Siegel, Esq. dated 10/6/89.

2) Notice of Cross Motion dated 10/16/89 with annexed affirmation of Thomas J. Reddington Esq. dated 10/13/89; Memorandum of law dated 10/13/89.

3) Notice of Cross Motion dated 10/20/89 with annexed affirmation of Paul Bibult, Esq. dated 10/19/89, memorandum of law dated 10/19/89.

4) Affirmation in opposition of Brian J. Shoot dated 10/23/89 with exhibits annexed; memorandum of law dated 10/24/89.

5) Reply affirmation of Roger E. Seigel dated 11/8/89 with annexed reply memorandum of law; Reply affirmation of Thomas Reddington dated 11/7/89 with annexed exhibits; Sur-reply affirmation of Brian J. Shoot dated 11/15/89 with exhibits annexed thereto.

The third party defendant Coastal Dry Dock and Repair Corp. moves for an order vacating the court's directed verdict on the issue of liability in favor of the Plaintiffs, recalling its memorandum decision dated September 14, 1989 denying summary judgment in favor of the two defendants and third party defendant, and for a further order granted summary judgment dismissing the plaintiffs' complaint. The Defendant City of New York and Brooklyn Navy Yard Development Corporation have crossmoved for similar relief.

These applications are based upon the decision of the Appellate Division Second Department in the case of Stuto v. Coastal Dry Dock ___ AD 2nd ___; New York Law

Journal 9/29/89 at page 24, a case quite similar to the case at bar, wherein the court held that the Longshoremans and Harbor Workers Act preempted the States Labor Law with respect to injuries arising on ships in dry dock undergoing repair.

While plaintiff has ably tried to distinguish the case at bar from the Stuto case supra, the court nevertheless is constrained based upon the Stuto case supra, to grant the motions of the defendants and third party defendant and accordingly the complaint of the plaintiffs are dismissed.

This constitutes the decision and order of the Court.

Enter

s/_____
J.S.C.

Appendix B - Opinion And Order of The New York Supreme Court, Appellate Division, Dated February 24, 1992 [Pages 4a - 30a]

TORRES v. CITY OF NEW YORK

Cite as 581 N.Y.S.2d 194 (A.D. 2 Dept 1992)

Schneider, Kleinick & Weitz, P.C., New York City (Brian J. Shoot, Ivan S. Schneider, and Gary Ehrlich, of counsel), for appellants.

O. Peter Sherwood, Corp. Counsel, New York City (Kristin M. Helerms and Margaret G. King, of counsel), for respondent City of New York.

Morris & Duffy, New York City (Irwin H. Haut, Patricia D'Alvia, and Joseph T. Glynn, of counsel), for defendant third-party plaintiff-respondent Brooklyn Navy Yard Development Corp.

Marchiseelo & Doody, New York City (Herzfeld & Rubin, P.C. [Herbert Rubin and David B. Hamm], of counsel), for third-party defendant-respondent Coastal Dry Dock & Repair Corp.

Before THOMPSON, J.P., and BRACKEN, SULLIVAN and LAWRENCE, JJ.

BRACKEN, Justice.

In determining whether or not this personal injury action falls within Federal maritime jurisdiction, we must resolve two issues. First, we must decide whether the wrong "occurred on navigable waters" (*Executivē Jet Aviation v. City of Cleveland, Ohio,* 409 U.S. 249, 253, 93 S.Ct. 493, 497, 34 L.Ed.2d 454). Second, we must assess whether there

is "some relationship between the tort and traditional maritime activities" (*Executive Jet Aviation v. City of Cleveland, Ohio, supra*, at 256, 93 S.Ct. at 498; *see also, Sisson v. Ruby*, ---U.S.---, 110 S.Ct. 2892, 111 L.Ed2d 292; *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed.2d 300). Our decision as to the first issue proceeds from our conclusion that the Supreme Court of the United States has neither explicitly nor implicitly overruled the holding of the New York State Court of Appeals, announced in *Butler v. Robins Dry Dock & Repair Co.*, 240 N.Y. 23, 147 N.E. 235, that a "graven dock", similar to the one in the present case, "is to be regarded as navigable water instead of land" (*Butler v. Robins Dry Dock & Repair Co., supra*, at 27, 147 N.E. 235). We decide the second issue by referring to a substantial body of State and Federal case law which holds that "the making of repairs to a ship is a traditional maritime activity" (*Executive Jet Aviation v. City of Cleveland, Ohio, supra*). We therefore conclude that the present case falls within Federal maritime jurisdiction and that the provisions of the New York State Labor Law may not be applied.

I

On September 8, 1983, the third-party defendant Coastal Dry Dock & Repair Corp. (hereinafter Coastal) was engaged in the repair of the USS Stump, a United States warship. As described by the plaintiffs' counsel in his opening, the "dry dock" in which these repairs were being made consisted of an enclosure containing sea water, into which the ship was floated, and from which the water was later drained.

The repairs to the USS Stump were being carried out in what is alternatively described as a "graven dock" (*see, Butler v. Robins Dry Dock & Repair Corp., supra*) or a "graving dock" (*see, e.g., J.J. O'Leary v. Puget Sound Bridge & Dry Dock Co.*, 349 F.2d 571 [9th Cir.]). According to a document prepared by the Department of the Navy, Bureau of Yards and Docks, cited in *J.J. O'Leary, supra,* at 573-574, a "graving dry dock is a permanently fixed basin with entrance enclosures constructed at or near the water's edge into which a ship can be floated and which can be pumped dry of water". This allows the exposure of those areas below the ship's water line which are in need of repair.

The repairs being made to the USS Stump necessitated the removal of a propeller bearing. While the bearing was being removed, an eyebolt, which had been used to connect the bearing to a land-based crane, snapped, causing the bearing to swing into a scaffold. The scaffold collapsed, and three Coastal employees, Angel Torres, Rene Jeantine, and Emile Rousseau, fell to the floor of the dock, sustaining personal injuries. These men were, at the time of this incident, standing on the scaffold approximately 35 feet above the floor and under the stern of the USS Stump.

These workers and their wives brought the instant action against the defendant City of New York, as owner of the property where the accident occurred, and against the Brooklyn Navy Yard Development Corporation, as the holder of a long-term lease of the property. There parties were concededly free of negligence, and would be liable, if at all, only pursuant to the provisions of Labor Law § § 240 and 241. The evidence tends to support the conclusion that the accident was due entirely to the negligence of the

third-party defendant Coastal, the employer of the injured plaintiffs. However, Coastal is immune from liability to the plaintiffs pursuant to the terms of the Longshore and Harbor Workers' Compensation Act (*see,* 33 U.S.C. §§ 901, 905[a]), and the plaintiffs have not directly sued Coastal.

The present appeal is from an order of the Supreme Court, Kings County (Vaccaro, J.), which, after a jury trial, vacated its prior ruling granting the plaintiffs judgment as a matter of law on the issue of liability, and granted the motions of the defendants and the third-party defendant for summary judgment dismissing the plaintiffs' complaint. The Supreme Court held that the Labor Law may not be applied in this case, because it has been preempted by Federal law, *i.e.*, the Longshore and Harbor Workers' Compensation Act (33 U.S.C. § 901, *et seq.*). We affirm on a different ground, to wit, that the plaintiffs' action is governed by traditional Federal maritime law.

II

The Constitution of the United States, article III, § 2, clause 1, provides that "[t]he judicial power [of the courts of the United States] shall extend * * * to all cases of admiralty and maritime jurisdiction". This provision of the Constitution has been implemented by 28 U.S.C. § 1333(1), which states that "[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases, other remedies to which they are otherwise entitled." The maritime jurisdiction of the Federal courts was further defined by Congress in the Admiralty Jurisdiction Extension Act of 1948 (46 U.S.C.App. § 740)

which states that "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land". The "saving to suitors" clause contained in 28 U.S.C. § 1333(1) permits state courts to adjudicate admiralty claims, provided that they apply Federal maritime law (*see, Offshore Logistics v. Tallentire,* 477 U.S. 207, 223, 106 S.Ct. 2485, 2494, 91 L.Ed.2d 174; *Garrett v. Moore - McCormack Co.,* 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 239; *Lerner v. Karageorgis Lines,* 66 N.Y.2d 479, 497 N.Y.S.2d 894, 488 N.E.2d 824; *Ugarte v. United States Lines,* 64 N.Y.2d 836, 486 N.Y.S.2d 934, 476 N.E.2d 333, *cert. denied* 474 U.S. 848, 106 S.Ct. 142, 88 L.Ed.2d 118; *Alvez v. American Export Lines,* 46 N.Y.2d 634, 415 N.Y.S.2d 979, 389 N.E.2d 461, *affd.* 44b U.S. 274, 100 S.Ct. 1673, 64 L.Ed.2d 284).

The only question to be decided on this appeal is whether "admiralty or maritime jurisdiction" within the meaning of the foregoing statutes exists in this case. The plaintiffs recognize that "[w]ith admiralty jurisdiction comes the application of substantive admiralty law" (*East River Steamship Corp. v. Transamerica Delaval,* 476 U.S. 858, 864, 106 S.Ct. 2295, 2298, 90 L.Ed.2d 865), and they also recognize that application of substantive maritime law would require them to prove that the defendants were at fault. Being unable to prove that defendants were in any way negligent, the plaintiffs concede that the application of Federal maritime law would warrant dismissal of their complaint.

The scope of Federal maritime jurisdiction in tort cases was, until relatively recently, defined with reference to

one single test, that is, a test based upon "the locality of the wrong" (*Executive Jet Aviation v. City of Cleveland, Ohio,* 409 U.S. 249, 253, 93 S.Ct. 493, 497, 34 L.Ed.2d 454, *supra; see also, Victory Carriers v. Law,* 404 U.S. 202, 205, 92 S.Ct. 418, 421, 30 L.Ed.2d 383). According to this test, the border between State tort law jurisdiction and Federal maritime jurisdiction was as easy to trace as the border between the land and the sea. Admiralty jurisdiction encompassed only those torts which were "committed on the high seas, or on the waters within the ebb and flow of the tide" (*Executive Jet Aviation Inc. v. City of Cleveland, supra,* 409 U.S. at 253, 93 S.Ct. at 497. *Victory Carriers, Inc. v. Law, supra,* 404 U.S. at 205, 92 S.Ct. at 421. *Thomas v. Lane,* 23 Fed. Cas. No. 13, 902, 957, 960 [C.C.Me.1813]). The scope of Federal maritime jurisdiction in tort cases was later expanded to cover "not only tidewaters, but all navigable water including lakes and rivers" (*Executive Jet Aviation v. City of Cleveland, supra,* 409 U.S. at 253, 93 S.Ct. at 497, citing *The Genesee Chief v. Fitzhugh,* 12 How. [53 U.S.] 443, 13 L.Ed. 1058). In contract cases, by way of contrast, Federal maritime jurisdiction has been traditionally defined not with reference to the locality of the wrong, but instead with reference to the nature of the transaction (*see, Exxon Corp. v. Central Gulf Lines,* --- U.S. ---, 111 S.Ct. 2071, 114 L.Ed.2d 649; *Grant Smith-Porter Ship Co. v. Rohde,* 257 U.S. 469, 476, 42 S.Ct. 157, 158, 66 L.Ed. 321; *Danielsen v. Morse Dry Dock & Repair Co.,* 235 N.Y. 439, 447, 139 N.E. 567, *cert. denied,* 262 U.S. 756, 43 S.Ct. 703, 67 L.Ed. 1217).

In applying the "locality of the wrong" test, the Supreme Court of the United States has consistently deemed piers and docks to be extensions of the land (*see, Victory Carriers v. Law, supra,* 404 U.S. at 206-207, 92 S.Ct.

at 422; *Cleveland Terminal & Val. R.R. Co. v. Cleveland S.S. Co.*, 208 U.S. 316, 28 S.Ct. 414, 52 L.Ed. 508; *Johnson v. Chicago & Pac. Elevator Co.*, 119 U.S. 388, 7 S.Ct. 254, 30 L.Ed. 447; *Ex parte Phenix Insurance Co. of Brooklyn, N.Y.*, 118 U.S. 610, 7 S.Ct. 25, 30 L.Ed. 274; *The Plymouth*, 3 Wall [70 U.S.] 20, 36, 18 L.Ed. 125 [1865]). In accordance with this general rule, longshoremen who were injured while standing on docks generally were not entitled to compensation under Federal maritime law (*see, e.g., Victory Carriers v. Law, supra; T. Smith & Son v. Taylor*, 276 U.S. 179, 48 S.Ct. 228, 72 L.Ed. 520; *State Indus. Comm. of State of N.Y. v. Nordenholt Corp.*, 259 U.S. 263, 42 S.Ct. 473, 66 L.Ed. 933).

This general rule was modified by the Admiralty Extension Act of 1948 (46 U.S.C.App. § 740) which extended maritime jurisdiction to encompass injuries caused to persons positioned on the land, provided that the injury was caused by a "vessel on navigable water" (*see, Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206, 83 S.Ct. 1185, 10 L.Ed.2d 297; *see also, Victory Carriers v. Law*, 404 U.S. 202, 92 S.Ct. 418, *supra;* Annotation, *Admiralty Extension Act*, 14 A.L.R.Fed. 664). To invoke maritime jurisdiction pursuant to this statute, "a plaintiff injured on shore must claim that the injury was caused by a defective appurtenance of a ship on navigable waters" (*Margin v. Sea-Land Services*, 812 F.2d 973, 975 [5th Cir.]; *see also, Executive Jet Aviation Inc. v. City of Cleveland, Ohio*, 409 U.S. 249, 260, n. 8, 93 S.Ct. 493, 501 n. 8, *supra; Victory Carriers v. Law, supra; Nacirema Co. v. Johnson*, 396 U.S. 212, 223, 90 S.Ct. 347, 354, 24 L.Ed.2d 371, *Whittington v. Sewer Constr. Co.*, 541 F.2d 427 [4th Cir.]; *Pryor v. American President Lines*, 520 F.2d 974 [4th Cir.], *cert. denied* 423 U.S. 1055, 96 S.Ct. 787, 46 L.Ed.2d 644; *Garrett v. Gutzeit*, 491 F.2d 228 [4th Cir.])

In the present case, the accident was caused by the improper use of an eyebolt which was not an appurtenance of the ship. Although the propeller bearing which swung into the scaffold, causing it to tip might be considered an appurtenance of the ship, there was no defect in the bearing itself, and it cannot properly be regarded as the instrument which led to the accident. Even were it to be regarded as such, maritime jurisdiction under the Admiralty Extension Act would exists only if the ship in question were itself located on "navigable waters". Thus, the first question for resolution in this case remains whether the ship and the men who were working underneath her stem were located, at the time of the accident, in an area which should be considered as an extension of the land (*see, T. Smith & Son v. Taylor,* 276 U.S. 179, 48 S.Ct. 228, *supra; The Plymouth,* 3 wall [70 U.S.] 20, *supra*) rather than as part of the "waters within the ebb and flow of the tide" (*Thomas v. Lane,* 23 Fed.Cas. No. 13,902 957, 960 [CC Me.1813], *supra*). In short, was there a maritime "situs"?

APPENDIX B
[Opinion And Order of The Appellate Division]

III

[1] As noted above, the injured plaintiffs in this case were working in an enclosed area into which the vessel in question had been floated and from which the water was then pumped. This is essentially the same sort of "graven dock" as that which the Court of Appeals, in *Butler v. Robins Dry Dock & Repair Co.*, 240 N.Y. 23, 147 N.E. 235, *supra*, had determined to be, in effect, an extension of the water rather than an extension of the land. Whether the holding of *Butler* is still valid is a central issue in this case. It is, therefore, important to examine closely the reasoning of the *Butler* Court, as expressed in its decision. The court wrote, in part, as follows:

"It is so well settled that we find on this appeal no dispute of the proposition that the question whether a tort is maritime or not is settled by the test of locality (*Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52 [34 S.Ct. 733, 58 L.Ed. 1208]). Unquestionably a tort occurring upon a vessel floating in navigable waters is maritime in its nature and it is also practically conceded that by extension of the reasoning applicable to such a situation, an accident occurring upon a vessel resting in a dock floating in navigable waters would be a maritime tort (*Great Lakes Dredge & Dock Co. v. Kierejewski*, 261 U.S. 479 [43 S.Ct. 418, 67 L.Ed. 756]; *Danielsen v. Morse Dry Dock & Repair Co.*, 235 N.Y. 439 [139 N.E. 567]). The contention, however, is that a graven dock such as the one involved in this case is part of the land and that, therefore, when a vessel rests in such a dock from which all of the water has been drawn it is really on land and that an accident happening to a person then on the vessel and certainly to one standing on the bottom of the dock itself is not a

maritime tort. We think the decisions of the Supreme Court hold the other way. We think that for the purposes of disposition of such a question as this and also somewhat as a matter of policy lest admiralty law otherwise might be robbed too much of its jurisdiction, it is settled that a vessel floated into a dock of this kind is still in navigable waters even though the water has been temporarily withdrawn. (*The Robert W. Parson*, 191 U.S. 17 [24 S.Ct. 8, 48 L.Ed. 73]; *The Steamship Jefferson*, 215 U.S. 130 [30 S.Ct. 54, 54 L.Ed. 125]; *So. Pacific Co. v. Jensen*, 244 U.S. 205 [37 S.Ct. 524, 61 L.Ed. 1086]; *see also, Anglo-Patagonian*, 235 Fed.Rep. 92; *Brandies Case*, 248 Mass. 31 [142 N.E. 844].)

. . . . .

"We have no doubt that within the decisions which we have cited * * * an accident happening to a workman standing on a staging on the outside of a vessel or on a dock at its keel and working on the vessel is just as much a maritime tort as though the man was standing on the deck of the vessel. The controlling circumstance is that he is engaged in making repairs on a vessel regarded as being in navigable waters and the particular foothold within the limits presented by this case which he utilizes in order to establish contact with the vessel and do his work cannot be material. (*Great Lakes Dredge & Dock Co. v. Kierejewski, supra; Anglo-Patagonian, supra*). Moreover, if for the purpose of the determination of the question now presented to us a ship is to be regarded as still in navigable water when it has been floated into and rests upon the dry bottom of such a dock as this, it must be because such dock is to be regarded as navigable water instead of land and if that is so the intestate constructively was standing in

navigable waters at the time when the plate fell and caused his death" (*Butler v. Robins Dry Dock & Repair Co., supra,* at 26-27, 147 N.E. 235).

In accordance with the foregoing, the court held that a tort action which arose from an off-vessel accident which occurred within the confines of a "graven dock" was governed by Federal maritime law.

The plaintiffs argue that the 1925 holding of *Butler* cannot be squared with subsequent decisions of the United States Supreme Court in cases such as *T. Smith & Son v. Taylor (supra) (see, also, Victory Carriers v. Law,* 404 U.S. 202, 92 S.Ct. 418, *supra; Nacirema v. Johnson,* 396 U.S. 212, 90 S.Ct. 347, *supra*). Thus, the plaintiffs invite this court to declare, in effect, that the *Butler* decision, to the extent that it holds that the confines of a "graven dock" are to be considered as equivalent to "navigable waters", has been implicitly overruled. Because the plaintiffs cite no case of the United States Supreme Court, decided either before or after *Butler*, which expressly holds that a "graven" dock should be considered as an extension of the land rather than of the water, their argument is that the underlying rationale of cases such as *T. Smith & Son v. Taylor (supra)* is inconsistent with the rationale which underlay the decision of the Court of Appeals in *Butler.*

As a matter of general logic, this contention is not wholly unpersuasive. It could be argued that there is no valid distinction between a person standing at the far end of a pier, on the one hand, and a person standing at the far end of the well of a "graven dock" on the other. Both persons might be located to the seaward side of an imaginary high tide line. Why should a legal distinction be

made between the two so that if they were injured while working on adjacent vessels, only one would have a maritime remedy? Why should it matter that the first person was kept dry by a horizontal platform supported by vertical pilings, while the second was kept dry by a vertical wall constructed so as to create an enclosed area from which the water had been pumped?

On further consideration, however, there also appear to be several arguments based on reason alone which support drawing a distinction between ordinary docks, on the one hand, and "graven docks", on the other. A pier is a more or less permanent fixture, and is meant to remain above the water level at all times. A "graven dock", by way of contrast, is a space which is dry only at times, after the water has been pumped out. Otherwise, it is a space which does consist of "navigable waters", in a sense, because it is clear that a ship about to be repaired must first navigate on the surface of the water into the "graven" dock. Thus, the "graven" dock may more easily be equated to artificial waterways, such as canals, which are generally held to be within maritime jurisdiction (*see, e.g., Matter of Boyer,* 109 U.S. 629, 3 S.Ct. 434, 27 L.Ed. 1056; *The Gerald A. Fagan,* 49 F.2d 215, *affd. sub nom. Marine Tr. Corp. v. Dreyfus,* 284 U.S. 263, 52 S.Ct. 166, 76 L.Ed. 282; *see also, The Robert W. Parsons,* 191 U.S. 17, 24 S.Ct. 8, 48 L.Ed. 73; *Southern Natural Gas Co. v. Gulf Oil Corp.,* 320 So.2d 917 [La.]; *Strickland v. Nutt,* 264 So.2d 317 [La.]; *Pellegrin v. Fidelity & Cas. Co. of N.Y.,* 193 So.2d 392 [La.]).

The merits of the *Butler* decision might thus be considered fairly debatable, as a matter of general logic. What is clear, however, is that the rationale of the *Butler* decision, however debatable it might be, is not directly

inconsistent with the rationale employed by the United States Supreme Court in any subsequent case, and is thus binding on us as an intermediate appellate court. For this reason, we are obligated to follow the holding of the *Butler* decision, whatever might be our view of the force of its underlying rationale.

It should be emphasized that when the Supreme Court decided the *T. Smith & Son v. Taylor,* 276 U.S. 179, 48 S.Ct. 228, *supra,* in 1928, it did not precipitously pronounce a new rule of law to the effect that, for the purpose of defining maritime jurisdiction in tort cases, piers and docks should be considered extensions of the land. The rule of maritime law pursuant to which piers and docks were to be considered as extensions of the land did not, in other words, take shape only after the 1925 decision of the New York State Court of Appeals in *Butler.* On the contrary, that rule had been established for many years. For example, in *The Plymouth,* 3 Wall (70 US) 20, 18 L.Ed. 125 (1865), *supra,* the plaintiff brought an action to recover damages for property which, while stored on a wharf, had been destroyed by a fire which had originated on an adjacent ship. Finding, in effect, that the wharf was an extension of the land, the court held that admiralty jurisdiction did not apply.

Similarly, in 1924, just one year prior to the *Butler* decision, the United States Supreme Court invoked this rule again in *State Indus. Comm. of State of N.Y. v. Nordenholt Corp.,* 259 U.S. 263, 42 S.Ct. 473, 66 L.Ed 933, *revg. Insana v. Nordenholt Corp.,* 232 N.Y. 507, 134 N.E. 549. In that case, the New York State Court of Appeals had held that Federal maritime law applied to a case involving a deceased longshoreman who had slipped and fallen on a dock while

unloading a ship. The United States Supreme Court reversed, holding instead that New York State Workers' Compensation Law applied, because the accident had occurred on land (*see, State Indux. Comm. of State of N.Y. v. Nordenholt Corp. supra,* at 275-276, 42 S.Ct. at 475, citing *Cleveland Terminal & Valley R.R. Co. v. Cleveland S.S. Co.,* 208 U.S. 316, 28 S.Ct. 414, *supra*). It is thus impossible to consider the holding of the Court of Appeals in *Butler,* to the effect that a "graven" dock is to be considered an extension of the water, as having been made in ignorance of the general rule that an ordinary dock is to be considered an extension of the land. Rather, the *Butler* court's holding must be viewed as a deliberate decision to create an exception to that general rule.

Furthermore, the *Butler* decision should not be viewed as novel, or as unsupported by precedent. Two of the United States Supreme Court cases cited in the text of that decision in fact hold, albeit in the context of contract rather than tort actions, that ships in "dry dock" should be viewed as being on the water, rather than on land. In *The Steamship Jefferson,* 215 U.S. 130, 142, 30 S.Ct. 54, 58, 54 L.Ed. 125, the court stated:

> "In reason, we think it cannot be held that a ship or vessel employed in navigation and commerce is any the less a maritime subject within the admiralty jurisdiction when, for the purpose of making necessary repairs to fit her for continuance in navigation, she is placed in a dry dock and the water removed from about her than would be such a vessel if fastened to a wharf in a dry harbor

where, by the natural recession and ebbing of the tide, she for a time might be upon dry land."

In a similar vein, the Supreme Court, in *The Robert W. Parsons,* 191 U.S. 17, 33-34, 24 S.Ct. 8, 13-14, *supra,* stated that

> "[a]ll injuries suffered by the hulls of vessels below the water line, by collision or stranding, must necessarily be repaired in a dry dock, to prevent the inflow of water, but it has never been supposed, and it is believed the proposition is now for the first time made, that such repairs were made on land. Had the vessel been hauled up by ways upon land and there repaired, a different question might have been presented, as to which we express no opinion; but, as all serious repairs upon the hulls of vessels are made in dry dock, the proposition that such repairs are made on land would practically deprive the admiralty courts of their largest and most important jurisdiction in connection with repairs. No authorities are cited for this proposition, and it is believed none such exist."

The *Robert W. Parsons* case *(supra),* like *The Steamship Jefferson* case *(supra)* was based in contract. However, the reasoning expressed in the language quoted above supports the conclusion reached by the Court of Appeals in *Butler.* In both *The Steamship Jefferson* and *The Robert W. Parsons,* "dry docks" more or less similar to the one at issue here were equated with the water rather than land, and it is difficult to see how that equation might have been affected by the contractual rather than the tortious nature of the lawsuits under consideration in those cases.

Subsequent cases of the United States Supreme Court illustrate this point. In *Great Lakes Dredge & Dock Co. v. Kierejewski,* 261 U.S. 479, 43 S.Ct. 418, 67 L.Ed. 756, the Supreme Court held that a plaintiff had a maritime cause of action where her decedent had drowned after the float upon which he had been standing while repairing an adjacent vessel was swamped as a result of the defendant's negligence. In *Gonsalves v. Morse Dry Dock & Repair Co.,* 266 U.S. 171, 45 S.Ct. 39, 69 L.Ed. 228, the plaintiff was injured by a "blau torch" while engaged in the repair of a steamer which was resting on a floating dock off 27th Street, Brooklyn. Citing *The Robert W. Parsons (supra)* and distinguishing *Cope v. Vallette Dry Dock Co.,* 119 U.S. 625, 7 S.Ct. 336, 30 L.Ed. 501, the court held that the accident occurred in "navigable waters" and thus recognized a maritime cause of action in favor of the plaintiff.

The *Gonsalves* case (*supra*) is important because it demonstrates that the United States Supreme Court considers the holding of *The Robert W. Parsons,* 191 U.S. 17, 24 S.Ct. 8, *supra* to be applicable in tort actions as well as in contract actions. In fact, assuming that floating docks are to be equated to graven docks (*see, Avondale Marine Ways v. Henderson,* 346 U.S. 366, 74 S.Ct. 100, 98 L.Ed 77 [Douglas J., concurring]). *Gonsalves* can be distinguished from the present case only in that, in *Gonsalves,* the accident occurred while the plaintiff was working while standing on, as opposed to standing next to, a vessel. However, *Kierejewski* illustrates how this distinction is immaterial, because in that case maritime jurisdiction was extended to an off-vessel accident.

The plaintiffs' reliance on *Dirma v. United States,*

695 F.Supp. 714 (E.D.N.Y.) and *Egan v. Morse Dry Dock & Repair Co.*, 214 App.Div. 226, 212 N.Y.S. 56 is unavailing. Neither the *Dirma* decision nor the *Egan* decision cites *Butler v. Robins Dry Dock & Repair Co.*, 240 N.Y. 23, 147 N.E. 235, *supra*. This may be understandable, since the United States District Court for the Eastern District of New York, which decided the *Dirma* case, was not bound by the holding of *Butler*, and thus had no occasion to cite it. The *Egan* court's silence as to *Butler* is less easily explained; the judges who decided *Egan* in October 1925 may have been unaware of the existence of *Butler*. Furthermore, neither of these decisions is particularly persuasive. For instance, *Dirma* relies upon cases (*see, e.g., Cope v. Vallette Dry Dock Co.*, 119 U.S. 625, 7 S.Ct. 336, *supra; J.M.L. Trading Corp. v. Marine Salvage Corp.*, 501 F.Supp. 323, [E.D.N.Y.]) which are not on point. *Egan* is factually distinguishable in that the plaintiff fell from a ladder which connected a ship in dry dock to an adjacent pier. In the present case, as in *Butler*, the plaintiff was inside the confines of the dry dock itself. More fundamentally, neither *Dirma* nor *Egan* may be considered binding on this court, as is *Butler*.

For these reasons, we conclude that the holding of the Court of Appeals in *Butler v. Robins Dry Dock & Repair Co. (supra)*, is fully consistent with what United States Supreme Court precedent there exists, and has not been overruled, implicitly or otherwise. In accordance with the holding of that case, it is clear that the tort which took place in this case occurred "on navigable waters" (*see also*, 2 C.J.S. Admiralty § 20).

[2] In *Executive Jet Aviation Inc. v. City of Cleveland, Ohio,* 409 U.S. 249, 253, 93 S.Ct. 493, 497, *supra,* the United States Supreme Court held that in order for maritime jurisdiction to exists in tort cases, the wrong must not only have occurred in navigable waters, but it must also have borne some relationship to "traditional maritime activities". The plaintiffs argue not only that there was no maritime "situs" in this case, an argument which we have rejected on the authority of *Butler v. Robins Dry Dock & Repair Co.,* 240 N.Y. 23, 147 N.E. 235, *supra,* but also that there is no maritime "nexus". We disagree.

It has been already held, in the context of a contract action, that the repairing of a ship is a "maritime" activity (*see, e.g., New Bedford Dry Dock Co. v. Purdy,* 258 U.S. 96, 42 S.Ct. 243, 66 L.Ed. 482; *see also, North Pac. S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co.,* 249 U.S. 119, 239 S.Ct. 221, 63 L.Ed. 510). As noted above, the scope of Federal maritime jurisdiction in contract actions depends not on the location of the wrong, but on the nature of the underlying transaction (*Exxon Corp. v. Central Gulf Lines,* ---U.S.---, 111 S.Ct. 2071, *supra*). However, we see no reason to distinguish between the so-called "nexus" test, as it has evolved in tort cases following Executive Jet Aviation, on the one hand, and the transactional test which has historically governed Federal maritime jurisdiction in contract actions. It would seem to us most unusual if the same activity, i.e., the repairing of a ship, were considered sufficiently related to maritime activities so as to give rise to admiralty jurisdiction in an action sounding in contract, but not sufficiently related to maritime activities so as to give rise to such jurisdiction in

an action based on tort.

In *Sisson v. Ruby,* --- U.S. ---, 110 S.Ct. 2892, *supra,* the court refined the "nexus" test, stating that there were in fact two dimensions to the "nexus", both of which had to be satisfied. Not only must the accident have arisen from "traditional maritime activities", but the accident must be of the general type which could in any way impede "maritime commerce". This additional aspect of the "nexus" test is satisfied here, since the United States Supreme Court has expressly stated that accidents which occur during ship repair bear a "direct relation to navigation and commerce" (*Robins Dry Dock & Repair Co. v. Dahl,* 266 U.S. 449, 457, 45 S.Ct. 157, 158, 69 L.Ed. 372; *see also, Great Lakes Dredge & Dock Co. v. Kierejewski,* 261 U.S. 479, 480, 43 S.Ct. 418, 418 *supra* [holding that right of recovery possessed by worker injured while repairing a scow was a matter which had "direct relation to navigation or commerce"]).

A review of other cases, several of which involve the scope of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. § 901, *et seq.*), but which are clearly analogous on this point, leaves no doubt that the repairing of a ship's propeller is a "traditional maritime activity". In *Broughton Offshore Drilling v. South Cent. Mach.,* 911 F.2d 1050 (5th Cir.), the court held that a claim based on the negligent repair of hydraulic rods on an oil rig had a sufficient connection to traditional maritime activities so as to support admiralty jurisdiction. In *Shea v. Rev-Lyn Contr. Co.,* 868 F.2d 515 (1st Cir.), the court held that the repairing of a drawbridge was a "traditional maritime activity" so as to provide a negligence remedy pursuant to the Longshore and Harbor Worker's

Compensation Act (33 USC § 905[b]) in favor of a worker who was injured while making such repairs from a crane supported by a barge. In *Ward v. Norfolk Shipbuilding & Drydock Corp.*, 770 F.Supp. 1118, 1121 (E.D.N.Y. 1991) the court recognized a Federal negligence cause of action pursuant to the Longshore and Harbor Workers' Compensation Act, stating that the plaintiff was "injured on navigable waters while doing repair work on a ship, a traditional maritime activity".

In *Antill v. Public Grain Elevator of New Orleans*, 577 So.2d 1039 (La.), the court held that the maritime "nexus" had been established where a longshoreman had contracted asthma as the result of the loading of grain onto ships. In *Orgeron v. Avondale Shipyards*, 561 So.2d 38, 43 (La.), *cer. denied* --- U.S. ---, 111 S.Ct. 62, 112 L.Ed.2d 36, the court noted that ship repair "has generally been regarded as a traditional maritime activity". In *Wistrom v. Duluth, Missabe & Iron Range Ry. Co.*, 437 N.W.2d 730 (Minn.), *cert. denied* 493 U.S. 991, 110 S.Ct. 538, 107 L.Ed.2d 536, the court held that the maintenance of machinery used in the loading and unloading of cargo was a "traditional maritime function".

We acknowledge that our holding that a maritime nexus exists in this case, in view of the fact that the injured plaintiffs were engaged in traditional maritime activity both at the time that they were injured and at the time of the injury-causing event, could be regarded as in conflict with certain decisions made by other courts. For example, in a case where a Navy seaman contracted a disease due to exposure to a toxic substance on board the aircraft carrier USS Independence, the United States Court of Appeals for the Eleventh Circuit has recently held that

maritime jurisdiction did not exist (*Cochran v. E.I. duPont deNemours,* 933 F.2d 1533 [11th Cir.], cert. denied --- U.S. ---, 112 S.Ct. 881, 116 L.Ed.2d 785). Focusing on the fact that the "instrumentality" which caused the injury (the nonskid hangar deck surface which the plaintiff, as part of his duties, had to grind and patch, causing emission of trichlorethylene dust) was not particularly "maritime" and that the disease (silicosis) caused by exposure to this "instrumentality" was also not particularly "maritime", the court concluded that no maritime nexus had been shown.

[3] We decline to follow *Cochran* or any other case which could be said to limit admiralty jurisdiction to cases in which the injury-provoking instrument, or the injury itself, can properly be defined as "maritime". This is carrying the "nexus" test too far. A person who is burned in the course of a fire at sea should not be deprived of an admiralty remedy to which he would otherwise be entitled solely because a fire can occur just as easily on land, or solely because a burn can just as easily be inflicted on land, or solely because the match which started the fire may not have been an inherently "maritime" instrument. We agree on this issue with our colleagues in the Appellate Division, First Department, and hold that a maritime "nexus" may exist in tort cases even where the injury-causing agency in not itself " maritime" (*see, Swogger v. Waterman S.S. Corp.,* 151 A.D.2d 100, 546 N.Y.S.2d 80, *but see, Keene Corp. v. United States,* 700 F.2d 836 [2d Cir.], *cert. denied* 464 U.S. 864, 104 S.Ct. 195, 78 L.Ed.2d 171). Thus, the fact that the eyebolt which snapped and caused the disaster in this case was not itself a "marine eyebolt" does not defeat admiralty jurisdiction.

[4] We are likewise in disagreement with any case

which can be read as holding that an injured party has no maritime remedy unless, at the time of the accident, he was actually carrying out a task requiring maritime or nautical skills. For example, in *Harville v. Johns Manville Prods. Corp.*, 731 F.2d 775 (11th Cir.), the court held that various "land based" workers (pipe fitters, machinists, welders) had no admiralty remedy for injuries sustained on what was assumed to be a maritime situs, focusing on the fact that the plaintiffs' jobs did not entail the skills normally associated with professional seamen (*see also, Austin v. Unarco Indus.*, 705 F.2d 1 [1st Cir.], *cert. dismissed* 463 U.S. 1247, 104 S.Ct. 34, 77 L.Ed.2d 1454). Taken to its extreme, this rationale would result in the limitation of admiralty jurisdiction to only those plaintiffs who were engaged, at the moment of the accident, in some type of "nautical" behavior. This, in turn, would be clearly inconsistent with Supreme Court precedent. For example, in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed.2d 550, the court held that maritime law governed the action brought by a "land based" plaintiff (a person visiting a crew member) who had fallen on a stairway on a ship.

Cases such as *Harville, Keene Corp.* and *Cochran* seem to us to reflect an unfortunate tendency to give inordinate weight to the "maritime" nature of isolated aspects of a case, when it is the "maritime" nature of the case as a whole which should govern. It seems to us futile to inquire whether a particular injury, or a particular tool, or a particular disease, or a particular instrument should be considered "nautical", and we do not believe that the scope of admiralty jurisdiction depends upon the answer to such questions. We will, therefore, make no attempt to list any number of "factors", or to define a test consisting of any

number of "prongs", as part of an attempt to formulate a definition of the term "nexus" that would be useful in all future admiralty cases. The attempts made by the various United States Courts of Appeals to formulate such an all-encom-passing definition (*see, Kelly v. Smith*, 485 F.2d 520 [5th Cir.] *cert. denied sub nom. Chicot Land Co. v. Kelly*, 416 U.S. 969, 94 S.Ct. 1991, 40 L.Ed.2d 558 [defining four-part test]; *see also, Lewis Charters v. Huckins Yacht Corp.*, 871 F.2d 1046 [11th Cir.]; *Drake v. Raymark Industries, Inc.*, 772 F.2d 1007 [1st Cir.]; *Guidry v. Durkin*, 834 F.2d 1465 [9th Cir.]; *Oman v. Johns Manville Corp.*, 764 F.2d 224 [4th Cir.], *cert. denied sub nom. Oman v. H.K. Porter Co.*, 474 U.S. 970, 106 S.Ct. 351, 88 L.Ed.2d 319), have, in our view, not led to satisfactory results.

Application of the "four-part" test as it is defined in cases such as *Kelly (supra)* has led to decisions such as *Harville v. Johns-Manville Prods. Corp.*, 731 F.2d 775 (11th Cir.), *supra, Cochran (supra) and Keene (supra)*, which we believe are incorrect. The four-part test has rightly been characterized as easily subject to judicial manipulation and as "highly questionable" (Comment: Jurisdiction in 905[b] Actions: Wrong Test Doomed to Wrong Results 13 Tulane Mar LJ 121 [1988]; *see also,* Berns, "Regression of Maritime Jurisdiction in Tort Actions", 3 U San Francisco Mar LJ 159 [1990-1991]; Comment: Admiralty Jurisdiction Over Asbestos Torts: Unknotting the Tangled Fibers, 54 U Chicago L Rev 312 [1987]). Rather than adopt the "fourpart" test, or any other multi-faceted test for defining the term "nexus" in *all* maritime cases, we simply hold that in this case, a "nexus" has been shown because it has been proved that at the time the wrongful act or omission occurred (the use of the eyebolt) and at the time of the accident, the injured plaintiffs were engaged in a pursuit,

i.e., ship repair, which the law has traditionally defined as "maritime".

[5] It is important to emphasize that analysis of the question of whether a maritime "nexus" has been shown must not be influenced by considerations that bear on the separate question of whether a maritime "situs" has been shown. The two tests present sufficient difficulties in their own right and these difficulties would only be compounded if the two tests were themselves confused. Thus, in the present case, once the "situs" test has been resolved (*see, Butler v. Robins Dry Dock & Repair Co.*, 240 N.Y. 23, 147 N.E. 235, *supra*), the location of the injured plaintiffs at the time of the accident becomes irrelevant to deciding whether the "nexus" test has been satisfied. Once this observation has been made, it seems to us to follow, more as a matter of common sense than as the result of the application of any particular legalistic formula, that the accident is related to traditional maritime concerns (*see also, Robins Dry Dock & Repair Co. v. Dahl*, 266 U.S. 449, 45 S.Ct. 157, 69 L.Ed. 372 [maritime jurisdiction held to displace New York Labor Law where worker fell from scaffold while working onboard steamship]).

We therefore conclude that maritime jurisdiction exists in this case (*see, Executive Jet Aviation v. City of Cleveland, Ohio*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454, *supra*).

APPENDIX B
[Opinion And Order of The Appellate Division]

V

The order appealed from is affirmed on the basis of the above analysis. It is appropriate at this point to explain, briefly, why the order appealed from may not be affirmed for the reasons stated by the Supreme Court, Kings County.

In *Stuto v. Coastal Dry Dock & Repair Corp.*, 153 A.D.2d 937, 545 N.Y.S.2d 743, this court held that in a case governed by maritime law, the liability provisions of the New York State Labor Law (Labor Law §§ 240, 241) could not be applied. In the present case, as noted above, this proposition is expressly conceded by the attorney for the plaintiffs. The argument made by the attorney for the plaintiffs in this case is that maritime law does not govern, therefore the New York State Labor Law governs.

The *Stuto* case, relied upon by the Supreme Court, Kings County, was decided in the context of an appeal where the plaintiff's attorney had apparently conceded the very issue which is now being litigated (the existence of maritime jurisdiction) and where the plaintiff's attorney had also apparently chosen to litigate the very issue which the attorney for the present plaintiffs now concedes (that maritime law prohibits imposition of liability in the absence of fault). Thus, however factually similar the two cases may be, *Stuto* cannot properly be considered controlling in this case. The proposition for which the defendants claim it stands, i.e., that maritime law governs accidents which occur within "graven" docks, was not adopted by the court, but instead was the subject of a formal concession.

[6] Furthermore, *Stuto* should not be read as

holding that Federal maritime jurisdiction exists pursuant to 28 U.S.C. § 1333(1) in any case where the plaintiff is shown to have accepted benefits pursuant to the Longshore and Harbor Workers Compensation Act (33 U.S.C. § 901 *et seq.*). The scope of Federal maritime jurisdiction in tort actions brought by injured harbor workers against parties other than their employers is unaffected by whether such statutory benefits have been obtained (*see, Millspaugh v. Port of Portland,* 65 Or. App. 389, 671 P.2d 743, 745-746; *Parker v. South Louisiana Contrs.,* 537 F.2d 113, 116-118 [5th Cir.], cert. denied 430 U.S. 906, 97 S.Ct. 1175, 51 L.Ed.2d 582; *Harville v. Johns-Manville Prods. Corp.,* 731 F.2d 775, 787, n. 9 [11th Cir.], *supra; Garvin v. Alumax of South Carolina,* 787 F.2d 910, 917 [4th Cir.], cert. denied 479 U.S. 914, 107 S.Ct. 314, 93 L.Ed.2d 288; *Drake v. Raymark Indus.,* 772 F.2d 1007, 1018 [1st Cir.], cert. denied 476 U.S. 1126, 106 S.Ct. 1994, 90 L.Ed.2d 675; *Dean v. State,* 542 So.2d 742, 744 [La.]). The Supreme Court apparently interpreted the *Stuto* decision as being contrary to this rule. Such a reading of *Stuto* is not warranted.

VI

For the foregoing reasons, we conclude that the present action falls within Federal maritime jurisdiction (U.S. Const., art. III, § 2, cl. 1; 28 U.S.C. § 1333[1]). This being the case, the provisions of the New York State Labor Law (Labor Law § § 240, 241) are not applicable, and, consequently, the defendants and the third-party defendant are entitled to summary judgment. In light of this determination, we need not address the various alternative contentions which the respondents have advanced in support of an affirmance. Accordingly, the order appealed from is

affirmed.

ORDERED that the order is affirmed, with one bill of costs.

THOMPSON, J.P., and SULLIVAN and LAWRENCE, JJ., concur.

Appendix C - Order of The New York Supreme Court, Appellate Division, Dated April 22, 1992 [Pages 31a - 32a]

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION
SECOND JUDICIAL DEPARTMENT

6799N
Z/nl

WILLIAM C. THOMPSON, J.P.
LAWRENCE J. BRACKEN
THOMAS R. SULLIVAN
CHARLES B. LAWRENCE, JJ.

90-02011

DECISION & ORDER ON MOTION

Angel Torres, et al., appellants, v
City of New York, et al., defendants-third-party plaintiffs-respondents;
Coastal Dry Dock & Repair Corp., third-party defendant-respondent.

Motion by the appellants for leave to appeal to the Court of Appeals from a decision and order of this court, dated February 24, 1992, which determined an appeal from a judgment of the Supreme Court, Kings County, dated December 13, 1989.

Upon the papers filed in support of the notion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied.

THOMPSON, J.P., BRACKEN, SULLIVAN and LAWRENCE,

APPENDIX C
[Order of The New York Supreme Court]

JJ., concur.

ENTER:

s/_____
Martin H. Brownstein
Clerk

April 22, 1992

TORRES V. CITY OF NEW YORK

Appendix D - Order of The New York Supreme Court of Appeals, Dated September 22, 1992

State of New York, Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-second day of September A.D. 1992

Present, HON. SOL WACHTLER, *Chief Judge, presiding.*

2-10 Mo. No. 642

Angel Torres, et al.,

Appellants,

v.

City of New York, et al.,

Respondents;

Coastal Dry Dock & Repair Corp.,

Third-Party Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements to respondent Brooklyn Navy Yard and third-party respondent Coastal Dry Dock & Repair Corp.

s/_____

Donald M. Sheraw
Clerk of the Court

Appendix E - Statutes Involved [pages 34a - 39a]

Statutes Involved

The United States Constitution, Article 3, section 2, clause 1

Section 2, Clause 1. Jurisdiction of Court

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -- to all Cases affecting Ambassadors, other public Ministers and Consuls; -- to all Cases of admiralty and maritime Jurisdiction; -- to Controversies to which the United States shall be a Party; -- to controversies between two or more States; -- between a State and Citizens of another State; -- between Citizens of different states; -- between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

28 U.S.C. § 1333

§ 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime ju-

risdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

46 U.S.C. § 740

§ 740. Extension of admiralty and maritime jurisdiction; libel in rem or in personam; exclusive remedy; waiting period

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: Provided, That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessel Act [46 USCS Appx. §§ 781 et seq.] or Suits in Admiralty Act [46 USCS Appx. §§ 741 et seq.], as appropriate, shall constitute the exclusive remedy for all causes of action arising after the date of the passage of this Act [enacted June 19, 1948] and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: Pro-

vided further, That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damages.

33 U.S.C. § 903

§ 903. Coverage

(a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employee in loading, unloading, repairing, or building a vessel). No compensation shall be payable in respect of the disability or death of -

(1) A master of member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to

injure or kill himself or another.

33 U.S.C. § 905, subds. (a) and (b)

§ 905. Exclusiveness of liability

(a) Employer liability; failure to employer to secure **payment of compensation**

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed that risk of his employment, or that the injury was due to the contributory negligence of the employee.

(b) Negligence of vessel

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title,

and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide shipbuilding or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing shipbuilding or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.[1]

33 U.S.C. § 933, subds. (a) and (i)

§ 933. Compensation for injury where third persons are liable

(a) Election of remedies. If on account of disability or death for which compensation is payable under this Act, the person entitled to such compensation deter-

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1 The above constitutes the statute as it existed in 1983, when the subject accident occurred. The statute was subsequently amended in 1984, effective as to injuries occurring on or after September 28, 1984. In essence, the amendments excluded coverage with respect to United States employees and officers and those of foreign governments. They also limited coverage vis-a-vis facilities engaged in building, repair or dismantling of "exclusively small" vessels. However, these amendments, even if effective as of the subject accident, would not have affected any issue presented in this case.

mines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

* * *

(i) **Right to compensation as exclusive remedy.** The right to compensation or benefits under this Act shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: Provided, That this provision shall not affect the liability of a person other than an officer or employee of the employer.

New York Labor Law, section 240(1)

§ 240. Scaffolding and other devices for use of employees
1. All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed ...

(3)

No. 92-1253

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

October Term, 1992

ANGEL TORRES, JOSEFINA TORRES, RENE JEANTINE, ROCHETTE JEANTINE, EMILE ROUSSEAU and CLAIRE ROUSSEAU,

Petitioners,

against

THE CITY OF NEW YORK and BROOKLYN NAVY YARD DEVELOPMENT CORPORATION,

Respondents.

BROOKLYN NAVY YARD DEVELOPMENT CORPORATION,

Respondent,

against

COASTAL DRY DOCK & REPAIR CORP.,

Respondent.

THE CITY OF NEW YORK,

Respondent,

against

COASTAL DRY DOCK & REPAIR CORP.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

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(9607—LC9-298—1993)

QUESTIONS PRESENTED FOR REVIEW

Respondent, Brooklyn Navy Yard Development Corporation, maintains that the underlying proceedings do not present any issues for resolution by this Court. Moreover, and in any event, even if this Court was disposed to grant the writ of certiorari, the decision of the New York State Supreme Court, Appellate Division, First Department would have to be affirmed, as fully consistent with the decisions of this Court.

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STATUTE:

28 U.S.C. §1257(3) 2

No. 92-1253

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992.

ANGEL TORRES, JOSEFINA TORRES, RENE JEANTINE, ROCHETTE JEANTINE, EMILE ROUSSEAU and CLAIRE ROUSSEAU,

Petitioners,

against

THE CITY OF NEW YORK and BROOKLYN NAVY YARD DEVELOPMENT CORPORATION,

Respondents.

BROOKLYN NAVY YARD DEVELOPMENT CORPORATION,

Respondent,

against

COASTAL DRY DOCK & REPAIR CORP.,

Respondent.

THE CITY OF NEW YORK,

Respondent,

against

COASTAL DRY DOCK & REPAIR CORP.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

Brief in Opposition to Petition for a Writ of Certiorari to the New York State Supreme Court, Appellate Division, First Department

Opinions and Judgments Below

The opinions below have been accurately reproduced in petitioner's petition for a writ of certiorari.

Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. §1257(3).

Constitutional Provisions and Statutes

The statutes involved in this matter are accurately reproduced and set forth at pages 34a-39a of the Appendix annexed to the petitioner's petition for a writ of certiorari. There are no constitutional issues involved in this case.

Counter Statement of the Case

Petitioner's account of the facts of this case, so far as recited, is substantially correct. However, this respondent draws this Court's attention to the following additional matters which are not set forth with sufficient particularity, or clarity, in the petitioner's statement of facts. The assertion by the petitioners at pages 3 and 4 of the petition to the effect that the petitioners were "all land-based dry dock workers" is, of course, a self-serving declaration in the context of this case, involving a graven dry dock. The scaffold upon which the men were standing at the time of

the accident rested on the bottom of the dry dock (296).[1] At the time of the occurrence, they were actually engaged in the performance of repair work on the U.S.S. Stump (294). The ship was resting on the bottom of the dry dock and the dry docking procedure was described to the jury as involving a boat being brought into an area where there was water (295). After the boat was brought into the area, the water was actually drained out so that the boat comes down and ultimately rests on large wooden devices or docks. At that time, it is possible to walk around on the floor of the dry dock bottom, or pit, underneath the boat, from which the water had been artificially removed, in order to perform repair services and to permit access to portions of the boat which would ordinarily be under the water line (295).

There were erected certain scaffolds standing on the very bottom of the dry dock to permit access by the workmen to various portions of the ship, which would normally be under water, which scaffolds were approximately 30 to 35 feet in height, above the bottom of the dry dock or pit (296). At that time, the job of the plaintiffs was to remove a large piece of metal from the rear of the vessel called "a shaft bearing" (296). It was explained to the jury that a portion of the propeller shaft protrudes from the rear of the vessel and that there is a bracket coming down from above, one end of which is attached to the rear of the vessel and the other end of which is attached to the propeller shaft (296). The shaft itself runs through that bracket, holding it in place. The shaft runs through a metal part in the bracket called a "shaft bearing". The work of the men involved the removal of the large piece of metal, the "shaft bearing," from the vessel (296). The "shaft bearing" is several feet long, is made out

[1]References in parentheses are to appropriate pages in the Record on Appeal filed in the New York Supreme Court, Appellate Division.

of very heavy steel and metal and weighs many thousands of pounds (297). It is furthermore set forth to the jury that in order to lift the subject "shaft bearing" out and up, there was need to utilize a crane, which was parked over and on the side of the dry dock, outside of the dry dock itself (297). There were lines running down from the crane to the area where the "shaft bearing" was being pulled out by the crane (297). The accident in question allegedly happened when the "shaft bearing" being removed allegedly struck the top of the scaffold, with the result that the appellants were allegedly thrown therefrom, falling to the bottom of the dry dock (298-301).

One of the respondents, Rene Jeantine, testified that he was standing on the scaffold while moving the "shaft bearing" (388). In order to move it, according to the witness, it had to be lifted off from the shaft to make it clear of the shaft. When it was, in fact, clear of the shaft, then the crane would be in a position to pull it out (388). He described the scaffold that he was standing on as being a pipe scaffold approximately 25 to 30 feet in height (389). He further testified (392):

> Q. Now, you are standing, at the time this occurred, under the stern of the ship, correct? The back of the ship?
>
> A. Yes.
>
> Q. And the propeller shaft is coming down at that point?
>
> A. Yes.
>
> Q. Were the propellers off at this time?
>
> A. Yes, the propeller already off.

> Q. If the ship, the stern of the ship, is up here, correct; the scaffold would be under the stern of the ship?
>
> A. Yes.

He described the function of the crane and stated that one of his co-workers was on the upper portion of the dry dock in order to coordinate his activities, in the dry dock itself, with those of the crane operator on the upper and outer portion of the dry dock (403-404).

He also testified that the crane operator was outside of the pit, when the work was being performed in the bottom of the pit (404).

He also described the accident itself involving the "shaft bearing" hitting the scaffold with the ensuing consequences (416-418).

The location of the accident itself was identified as being Dry Dock #6 by another witness, Theodore Hansen (331). He testified that when he passed upon the upper and outer portion of the dry dock that it was possible, by looking down, to visualize the workmen working on the scaffolding below at the stern of the vessel (369). He stated that, at the time in question, the supervision of the workers was by a Coastal employee, known as Oscar (378) and he confirmed the nature of the work in which the appellants were involved at the time of the alleged occurrence (379).

The foregoing reflects that the incident giving rise to this lawsuit, and ultimately to this petition for a writ of certiorari, arose out of, was inextricably connected to and occurred in the course of ship repair operations in a dry

dock which have historically *always* been held to be within the ambit of admiralty jurisdiction by this Court and by the Court of Appeals of the State of New York.

It is furthermore to be noted that the petitioners concede that they would not be entitled to any recovery whatsoever under the application of admiralty law, which we submit is applicable herein (Petit. p. 8).

REASONS FOR DENYING THE WRIT

POINT I

None of the considerations governing this Court's review of a petition for writ of certiorari are present here.

The only possible predicate for the exercise of this Court's jurisdiction in issuing a writ of certiorari in this case is under its rules, at Part III, Rule 10.1(c).

That rule sets forth, in substance, that when a state court, or United States Court of Appeals, has decided an *important* question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court, that this Court may take such into consideration in granting a writ of certiorari.

That rule in no way entitles the respondents to the consideration of this Court. There is no doubt that the Appellate Division of the First Department, to which this petition for a writ of certiorari is directed, is a State Court which has

decided a question of federal law. However, as will be made more fully apparent at Point II *infra*, the issue of the applicability of maritime law to the presented circumstances does not constitute "an important question of federal law which has not been, but should be, settled by this Court," within the meaning of Rule 10.1(c). This for the simple but eloquent reason that no issue is raised by the instant petition, which has not been settled by this Court. It follows, *a fortiori*, that this matter does not present an instance of a federal question having been decided by the Appellate Division "in a way that conflicts with applicable decisions of this Court," under Rule 10.1(c). Nothing could be further from the truth, as will be more fully shown at Point II *infra*. The decision of the Appellate Division, predicated as it was on the decision of the Court of Appeals of New York in the case of *Butler v. Robins Dry Dock & Repair Co.*, 240 N.Y. 23, 147 N.E. 235 (1925), was and remains fully consistent with the decisions of this Court. There is no conflict whatsoever between those decisions and decisions of this Court. On the contrary, it will be shown that those decisions are fully, completely and irrevocably consistent therewith. The instant petition should, accordingly, be denied.

POINT II

There is no purpose to the granting of the writ of certiorari, since the decision of the New York State Supreme Court, Appellate Division, First Department would be affirmed, as fully consistent with the decisions of this Court.

The sole issue presented is the continued viability, under the decisions of this Court, of the decision of the New York

Court of Appeals in the *Butler v. Robins Dry Dock & Repair Co.* case, *supra,* relied upon by the Appellate Division. Although not, of course, binding on this Court, it is surely worthy of *some* consideration that the Appellate Division held that the *Butler* decision, *supra,* was fully consistent with the decisions of this Court. See page 20a of Appendix B to this petition. It is, of course, conceded by the petitioners that the *Butler* decision governs this case, if consistent with the decisions of this Court. In *Butler,* it was held that a dry dock was within admiralty jurisdiction. The denial of petitioners' motion for leave to appeal to the Court of Appeals, interposed to the Appellate Division, as well as the denial of a similar motion to the Court of Appeals, reflects that both such courts assumed the continued viability of the *Butler* decision, under the decisions of this Court.

The decision in the *Butler* case is, indeed, fully consistent with the decisions of this Court.

Repair of a vessel in a graven dry dock was within the ambit of admiralty jurisdiction under the decisions of this Court, prior to and subsequent to the decision of this Court in *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249, 93 S. Ct. 493, 34 L. Ed.2d 454 (1972). See, *Sisson v. Ruby,* 497 U.S. 358, 110 S. Ct. 2892, 111 L.Ed.2d 292 (1990), and particularly n. 4.

In *Butler,* the Court of Appeals of this State, relying upon decisions of this Court, held that a tort occurring upon a vessel in a dry dock, identical to that presented in this case, from which all navigable waters had been withdrawn, was within admiralty jurisdiction and stated, in pertinent part, as follows (240 N.Y. 26):

> "We think that for the purposes of disposition of such a question as this, and also somewhat as a matter of policy lest admiralty law otherwise be robbed too much of its jurisdiction, it is settled that a vessel floated into a dock of this kind is still in navigable waters even though the water has been temporarily withdrawn. The Robert W. Parsons, 191 U.S. 17, 24 S.Ct. 8, 48 L.Ed. 73; The Steamship Jefferson, 215 U.S. 130, 30 S.Ct. 54, 54 L.Ed. 125, 17 Ann. Cas. 907; *So Pacific Co. v. Jensen,* 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086, L.R.A. 1918 C, 451, Ann. Cas. 1917 E 900. See also, Anglo-Patagonian, 235 F. 92, 148 C.C.A. 586; *Brandeis Case,* 248 Mass. 31, 142 N.E. 844."

In *Butler,* as in this case, the accident in question occurred, not while the person involved *was in the vessel, or on the vessel,* but while he was under the bulge of the upper part of the vessel and while working in the bottom of the dry dock area, when a plate from the side of the vessel dropped upon him and caused his death. In applying admiralty law, the Court held, as urged by this respondent below, that the exact placement, or location, of the injured party in the dry dock is of no consequence, since it is the operation of the dry dock itself, with all of its appurtenances, which affords the predicate for the application of maritime law. As such, it is completely irrelevant, as urged by this respondent below, and as determined in *Butler,* whether the individual injured was *on the vessel, in the vessel, or adjacent thereto,* the determinative consideration being whether he was engaged in the type of work for which the vessel was placed in dry dock. As stated in the *Butler* case, *supra,* in such regard (240 N.Y. 27):

> "Moreover, if for the purpose of the determination of the question now presented to us a ship is to be regarded as still in navigable water when it has been floated into and rests upon the dry bottom of such a dock as this, it must be because such dock is to be regarded as navigable water instead of land, and if that is so the intestate constructively was standing in navigable waters at the time when the plate fell and caused his death."

The decision in the *Butler* case was fully consistent with the decisions of this Court. See, e.g., *Gonsalves v. Morse Dry Dock & Repair Co.*, 266 U.S. 171, 45 S.Ct. 39, 69 L.Ed. 228 (1924); *Great Lakes Dredge & Dock Co. v. Kierejewski*, 261 U.S. 479, 43 S.Ct. 418, 67 L.Ed. 756 (1923); *Robins Dry Dock & Repair Co. v. Dahl*, 266 U.S. 449, 45 S.Ct. 157, 69 L.Ed. 372 (1925).

Furthermore, and in any event, historically a second, and completely independent, predicate for the application of admiralty jurisdiction exists in this matter in that it is not open to question that a contract for the repair of a vessel, as distinguished from one for its construction, is and has always been construed as a maritime contract by this Court and by the New York State Court of Appeals, applying the decisions of this Court. See *Danielsen v. Morse Dry Dock & Repair Company*, 235 N.Y. 439, 139 N.E. 567 (1923). In *Danielsen*, Judge Cardozo held that a vessel undergoing repairs in dry dock was within admiralty jurisdiction. The plaintiff in that case was employed by the defendant as a burner and was sent aboard the vessel to burn the bolts and metal plates. While so engaged, he suffered injuries due to the defendant's negligence. In upholding the applicability of maritime jurisdiction, Judge Cardozo pointed out that the

contract for the repair of the ship, as distinguished from one for its construction, is a maritime contract. He added (235 N.Y. 442, 139 N.E. 568):

> "The jurisdiction of admiralty over contracts is governed by the nature of the transaction. The jurisdiction of admiralty over torts is governed by locality (*Grant Smith-Porter Co. v. Rohde*, 257 U.S. 469, 476; *State Industrial Comm. v. Nordenholt*, 259 U.S. 567). This action being in tort, the plaintiff brings his case within the maritime law if he satisfies one of the two tests of jurisdiction, the test of locality. He goes farther, however, and satisfies them both. A contract for the repair of a ship, as distinguished from one for its construction, is a maritime contract (*The Robert W. Parsons*, 191 U.S. 17; *Thames Towboat Co. v. The Schooner Francis McDonald*, 254 U.S. 242). A vessel in a dry dock, which is afloat in navigable waters, is itself in those waters as truly as if moored to a wharf or beside a pier (*The Jefferson*, 215 U.S. 130, 142, 143; *The Robert W. Parsons*, 191 U.S. 17, 33; *The Anglo-Patagonian*, 235 Fed. Rep. 92). There is a concurrence of the two elements of maritime jurisdiction. A workmen's compensation statute, not founded upon consent, but acting *in invitum*, will not displace the rights and remedies established by the law of the sea (*Southern Pacific Co. v. Jensen*, 244 U.S. 205; *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149; *State Industrial Commission v. Nordenholdt, supra; Matter of Red Cross Line v. Atlantic Fruit Co.*, 233 N.Y. 373).

See also, *North Pacific Steamship Co. v. Hall Brothers Marine Railway & Shipbuilding Company*, 249 U.S. 119, 39 S.Ct. 221, 63 L.Ed. 510 (1919).

Up to the decision of this Court in the case of *Executive Jet, supra*, no issue whatsoever *could*, or *would*, possibly have been raised that the accident in this case was not within the proper scope of admiralty jurisdiction.

However, following that decision, as noted above, a certain element of confusion was engendered among the various United States Courts of Appeal regarding the scope thereof, which confusion has now been totally eliminated by this Court's decisions in *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 102 S. Ct. 2654, 73 L.Ed.2d 300 (1982) and *Sisson v. Ruby, supra*. In *Sisson*, this Court extensively discussed its prior decisions in the *Richardson v. Foremost* and *Executive Jet* cases. It is quite clear that, as enunciated by this Court in *Sisson*, there was never any intention by it to exclude from admiralty jurisdiction those matters which had traditionally come within the scope of admiralty jurisdiction. In *Sisson*, this Court held that the two predicates for admiralty jurisdiction were that the incident must bear a significant relationship to maritime commerce and must be such as to arise from traditional maritime activities.

It cannot be gainsaid that injury of the type involved in this case, in the course of ship repair, by men working on a scaffold in a graven dry dock bears a significant relationship to maritime commerce, thus satisfying the first prong of that test.

In *Sisson, supra,* this Court stated (110 S. Ct. 2896, n.2):

> "In *Foremost,* the Court unanimously agreed that the purpose underlying the existence of federal maritime jurisdiction is the federal interest in the protection of maritime commerce, and that a case must implicate that interest to give rise to such jurisdiction."

This first aspect of the test is thus complied with, in that ship repairs to a completed vessel, as distinguished from one under construction (see *Grant Smith-Porter Ship Co. v. Rohde,* 257 U.S. 469, 42 S. Ct. 157 [1922], distinguished by Judge Cardozo in *Danielson, supra,* 235 N.Y. 442-443, 139 N.E. 568-569) is not of mere local concern, but had,

> "direct relation to navigation and commerce".

Robins Dry Dock & Repair Co., supra, 266 U.S. 457, 45 S. Ct. 158. See also, decision of the Appellate Division in this case (Appendix B, p. 22a) and *Great Lakes Dredge & Dock Co., supra.*

The second prong is similarly complied with. Thus, under this Court's formulation in *Sisson,* the determination as to whether an incident arose from traditional maritime activity requires a definition of the "relevant activity," which:

> ". . . is defined not by the particular circumstances of the incident, but by the general conduct from which the incident arose."

Sisson, supra, 110 S. Ct. at 2897.

As noted by this Court, in *Sisson*, the airplane in *Executive Jet*, although landing in Lake Erie, failed this test for admiralty jurisdiction precisely because the "relevant activity" was not the plane sinking in Lake Erie, but air travel generally, which was never, historically or traditionally, encompassed within admiralty jurisdiction. The *fortuitous* circumstance of the plane landing on, or in, Lake Erie, as opposed to its impacting upon land, was not sufficient for the invocation of admiralty jurisdiction.

In this case, on the other hand, the "relevant activity" is ship repair, which has always, historically and traditionally, come within admiralty jurisdiction.

The second prong of the test is, accordingly, met.

These conclusions are buttressed by this Court's comments at pages 2897 and 2898 of its decision in *Sisson, supra*, to the effect that navigation was not the only activity that was sufficient to confer admiralty jurisdiction under the *Executive Jet* and *Sisson* tests. This Court stated (110 S. Ct. 2898):

> "The need for uniform rules of maritime conduct and liability is not limited to navigation, but extends at least to any other activities traditionally undertaken by vessels, commercial or non-commercial".

This conclusion applies to the type of maritime activities involved in this lawsuit as well.

As furthermore noted by this Court in the *Sisson* case, which comments are particularly applicable in this case (110 S. Ct. 2898):

> "Clearly, the storage and maintenance of a vessel at a marina on navigable waters is substantially related to 'traditional maritime activity' *given the broad perspective demanded by the second aspect of the test.*" (Emphasis supplied)

To paraphrase the above-quoted comment of this Court:

> "Clearly, the repair of a vessel in a graven dry dock is substantially related to 'traditional maritime activity' given the broad perspective demanded by the second aspect of the test."

See, also, *Texaco Refining & Marketing, Inc. v. Estate of Dau Van Tran*, 110 S. Ct. 3266, 111 L.E.2d 776 (1990) wherein this Court vacated the judgment of the Texas Court of Appeals, Ninth District and remanded the case to that Court for further consideration in light of this Court's prior decision in *Sisson v. Ruby, supra*, and *Exxon Corp. v. Central Gulf Lines, Inc.*, 111 S. Ct. 2071, 114 L.Ed.2d 649 (1991), citing with approval the case of *North Pacific Steamship Co. v. Hall Brothers Marine Railway & Shipbuilding Co., supra*, at 111 S. Ct. 2076.

Beyond these reasons for denying petitioners' writ there remains the historic, and still highly relevant, demarcation of federal maritime jurisdiction as inclusive of "all areas within the ebb and flow of the tide, regardless of whether those areas are actually covered by water at the time of the

alleged event." *See, Hassinger v. Tideline Electric Membership Corp.*, 781 F.2d 1022, 1026, *cert. denied*, 478 U.S. 1004 (1986); *Borax Consolidated Ltd. v. City of Los Angeles*, 296 U.S. 10 (1935); *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978).

The "mean high water mark" [*Leslie Salt Co., supra*, 578 F.2d at 750] is generally considered to be "the line to which high water ordinarily reaches." *U.S. v. Harrell*, 926 F.2d 1036, 1042 (11th Cir. 1991). Accordingly, as overwhelmingly held by virtually all federal courts, incidents occurring seaward of the mean high water mark, as here, take place in navigable waters and are fully encompassed within federal maritime jurisdiction. *See, Hassinger v. Tideland Electric, supra; Leslie Salt Co., supra; Boudreau v. American Workover, Inc.*, 680 F.2d 1034 (5th Cir. 1982), *cert denied*, 459 U.S. 1170 (1983); *U.S. v. 119.67 Acres of Land*, 663 F.2d 1328, 1334 (5th Cir. 1981); *Gahagan Const. Corp. v. Aramo*, 165 F.2d 301, 303 (1st Cir.), *cert denied*, 333 U.S. 876 (1948); *U.S. v. Sasser*, 738 F.Supp. 177, 179 (D.S.C. 1990).

Petitioners' reliance on the "gangplank" rule is to no avail. In view of the undisputed facts of this case, a gangplank was neither in use nor contemplated. *See, Southern Pacific Co. v. Jensen*, 224 U.S. 205 (1917).

Thus, from the perspective of established rules of law, petitioners, at the time of their accident, were not only in, but *under*, navigable waters, and certainly within maritime jurisdiction.

Conclusion

Upon the facts and the law of this case, there is no basis for review thereof by the Supreme Court of the United States and the petition for a writ of certiorari should, accordingly, be denied.

Respectfully submitted,

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